



**Arbitration CAS 2008/A/1549 Luke Michael v. Australian Canoeing, award of 4 June 2008**

Panel: The Hon. Justice Roger Gyles AO (Australia), Sole Arbitrator

*Canoeing*

*Selection dispute*

*Nomination criteria for selection for the 2008 Olympic Games in the Australian Olympic Team*

*Decision taken by AC Selection Panel affected with bias*

*Jurisdiction of a newly constituted AC selection Panel to reconsider the matter of selection*

- 1. A tribunal should not be remitted a matter – regarding selection of an athlete – to selectors whose decision has been tainted by actual bias. The inference that the bias which existed could not be entirely eradicated in those circumstances is irresistible. Under Australian case law, it is admitted that a decision is never remitted to a biased decision maker absent compelling necessity. It follows that the error of sending the matter back to the same AC Selection Panel necessarily infected the second process with bias and the AC Appeals Tribunal was in error in not so finding.**
- 2. Clause 11.19 of the AOC By-Law makes it clear that the usual practice would be to refer the question of renomination back to AC. Therefore, the question of renomination to the AOC by AC for selection in the 2008 Australian Olympic Team in the Men's Kayak Flatwater Category should be referred back to a newly constituted AC Selection Panel.**

The Appellant, Mr Luke Michael, is an Australian flatwater kayak paddler who has represented Australia on an international level.

The Respondent, Australian Canoeing (AC), is the National Federation (NF) responsible for the management, coordination, development and promotion of paddle sports in Australia.

Mr Jacob Clear, Mr Clint Robinson, Mr Tony Schumacher, Mr David Smith and Mr Tate Smith are Australian flatwater kayak paddlers who were listed by the Appellant as Affected Parties in this Appeal to the Court of Arbitration for Sport (CAS).

At the beginning of March 2008, the Appellant developed an infection in his left middle finger which necessitated three operations during his stay in hospital from 5 to 11 March 2008. The Appellant was placed on intravenous and oral antibiotics and received medical advice that he should not compete in the upcoming Nomination Trials.

The Appellant and his coaches, Mr Jim Walker and Mr Guy Wilding, each had conversations with the National Performance Director at the Australian Institute of Sport, Mr Richard Fox, about the Appellant's injury prior to the first Nomination Trial.

The Appellant competed in the first Nomination Trial, which was held from 12 to 16 March 2008 at the Sydney International Regatta Centre, Penrith, NSW. Mr Clint Robinson also competed in the first Nomination Trial.

In the period between the first and second Nomination Trials, the Appellant's finger remained infected and he was prescribed another course of oral antibiotics.

On 25 March 2008, following medical advice that he should not compete due to a respiratory tract infection, Mr Clint Robinson advised the Chief Executive of AC, Ms Kate Heeley, of his inability to compete in the second Nomination Trial.

The Appellant competed in the second Nomination Trial, which was held from 25 to 27 March 2008 at the Sydney International Regatta Centre, Penrith, NSW. At the conclusion of the Trial, the Appellant was ranked in sixth position and had the necessary points for nomination in one of the six available positions.

On 27 March 2008, the AC Selection Panel announced that Mr Ken Wallace, Mr David Smith, Mr Tate Smith, Mr Jacob Clear, Mr Clint Robinson and Mr Tony Schumacher would be nominated to the AOC for selection in the 2008 Australian Olympic Team in the Men's Kayak Flatwater Category (the "First Panel Decision"). The Appellant was not nominated.

The AC Selection Panel stated in its announcement that "Clint Robinson did not attend Nomination Trial 2 due to illness. In considering the performances of athletes at the Nomination Trials, the Selection Panel gave weight to extenuating circumstances and determined that under normal circumstances Clint Robinson would have a high probability of meeting the criteria for nomination to the AOC".

On 9 April 2008, the Appellant appealed to the AC Appeals Tribunal against the First Panel Decision. In its decision dated 15 April 2008 (the "First Tribunal Decision"), the AC Appeals Tribunal upheld the Appellant's appeal on the grounds that the First Panel Decision was affected by actual bias. The relevant portion of the First Tribunal Decision was as follows:

It is arguable that this method of nominating Robinson in the place of the Appellant was unfair and showed a bias towards Robinson because the panel were aware that the Appellant had also been ill and his performances would be affected by this illness but did not consider this at all in determining how much weight they gave to Robinson's circumstances – basically, the panel looked at what times Robinson would have delivered had he been well and competed and gave this significant weight (arguably enormous weight if another athlete's position in the hierarchy is affected) whereas it never considered, in making that decision, that those times needed to be balanced against what the Appellant's times would have been had he been fit. It is arguable that looking at Robinson's ill health and concluding that he would have scored a certain number of points had he competed, but not doing this with regard to the

points the Appellant would have obtained had he competed fully fit (even though it knew he wasn't well) showed an actual bias toward Robinson due to a belief by the panel that it stood a greater chance of securing a medal in the appointment of Robinson to the Olympic team.

The AC Appeals Tribunal remitted the nomination decision back to the AC Selection Panel with a recommendation that the weight given to the extenuating circumstances of Mr Clint Robinson be reconsidered in light of the fact that the Appellant was injured at the time of the Nomination Trials.

On 16 April 2008, the AC Selection Panel reconsidered the nominations and confirmed the Appellant's non-nomination to the AOC for selection in the 2008 Australian Olympic Team in the Men's Kayak Flatwater Category (the "Second Panel Decision").

On 23 April 2008, the AC Appeals Tribunal heard the Appellant's appeal against the Second Panel Decision. The AC Appeals Tribunal refused leave for the Appellant to be represented by counsel. In its decision dated 2 May 2008 (the "Second Tribunal Decision"), the AC Appeals Tribunal dismissed the Appellant's appeal. Paragraph 35 of the Second Tribunal Decision was as follows:

It is the Tribunal's view that clause 11.5(3) of the AOC By-Law requires actual bias to be shown as opposed to a reasonable apprehension of bias. By a majority of the Tribunal members, the Tribunal has determined that the Appellant has not established to the Tribunal's reasonable satisfaction that the nomination decision was affected by actual bias. The Selection Panel have demonstrated that they have revisited the selection process by reconsidering the extent of weight given to the extenuating circumstances of Robinson having regard to the knowledge by the Selection Panel of the medical condition of the Appellant at the time of making its selection decision as affecting the performance of the Appellant. In this arbitration, the Appellant appeals to the CAS against the Second Tribunal Decision.

The pre-hearing activity was organised, by agreement between the Parties, on a timetable that took account of the urgent nature of the Appeal.

In accordance with the directions given at conference call directions hearings on 9 May 2008 and 12 May 2008, the Appellant filed an appeal brief on 9 May 2008 and the Respondent filed a response on 12 May 2008.

The Affected Parties were made aware of this Appeal following the first conference call directions hearing on 9 May 2008, by email from the Appellant's representative. In addition, the CAS Oceania Registry Court Office wrote to the Affected Parties on the morning of 12 May 2008, notifying them of the second conference call directions hearing that day. Following that conference call directions hearing, the CAS Oceania Registry Court Office wrote to the Affected Parties notifying them of the Appellant's intention to make submissions concerning the forfeiture of a right of appeal by Affected Parties who do not participate in the hearing.

On 13 May 2008, the hearing took place in Sydney, Australia.

Shortly prior to the hearing of this appeal, counsel for the Appellant filed a supplementary submission, part of which was as follows:

The argument which would have been developed at the second Tribunal hearing, if legal representation had been permitted, is that the Tribunal should not have remitted the matter to selectors whose decision had been tainted by actual bias.

A finding of actual bias disqualifies the decision maker for all time. It is fundamental that a biased decision maker cannot be asked to consider a matter without the influence of bias. However, this is what the Tribunal was asking the selectors to do, and what the selectors purported to do. The Tribunal erred in law in adopting that course and not correcting the error on the second appeal.

The supplementary argument raised a threshold issue which did not involve questions of fact and degree. It was either right or wrong. It was, thus, suitable to be decided as, in effect, a preliminary point.

Counsel for the AC argued that this ground was misconceived for more than one reason. It was submitted that the bias which needed to be found was actual not apprehended bias. This may be accepted for the purposes of argument. The bias found by the First Tribunal Decision was actual bias – not against the Appellant but, rather, in favour of a competitor, Mr Clint Robinson. The next step was to say that it cannot be assumed that the AC Selection Panel, the error having been pointed out, could not have eradicated the bias from their mind and approached the matter properly. Put another way, it cannot be concluded that the members of the AC Selection Panel had invincible bias within the meaning discussed in *Cains v Jenkins* (1979) 28 ALR 219 and *Australian Workers' Union v Bowen (No 2)* (1948) 77 CLR 601. It was submitted that there was, therefore, nothing wrong in sending the matter back to the same AC Selection Panel. It was pointed out that, in the Second Tribunal Decision, the AC Appeals Tribunal had reviewed what had taken place and, albeit by majority, had found that there was no bias. It was also submitted that the relevant error, if there were one, was that by the AC Appeals Tribunal in the First Tribunal Decision, in remitting the matter back to the same selectors. There had been no appeal from that decision and the Appellant was out of time to appeal now. That error was not made in the Second Tribunal Decision from which this appeal lies.

## LAW

### The Arbitration Agreement and Jurisdiction of the CAS

1. All parties to this Appeal have agreed and consented to the jurisdiction of the CAS, in accordance with the Code of Sports-Related Arbitration (2004 Edition) (the “CAS Code”), to hear and determine this Appeal.
2. In any event, the jurisdiction of the CAS to hear this Appeal arises from clause 11.1 of the 2008 Australian Olympic Committee (AOC) Olympic Team Selection By-Law (the “AOC By-Law”), which states as follows:

*Subject to clause 11.13, any dispute regarding an Athlete's nomination or non-nomination by an NF to the AOC will be addressed according to the following appeal procedure:*

- (1) *the appeal will be first heard by the Appeal Tribunal established by the NF controlling the relevant sport pursuant to clause 10; and*
  - (2) *any subsequent appeal will be heard by the Appeals Arbitration Division of CAS.*
3. The parties agreed to appoint a Sole Arbitrator to hear this Appeal.
4. Clause 11.10 of the AOC By-Law provides as follows:  
*The sole grounds for any appeal against a decision of the Appeals Tribunal are:*
  - (1) *a breach of the rules of natural justice by the Appeals Tribunal; or*
  - (2) *that the decision of the Appeals Tribunal is otherwise wrong in law.*
5. Clause 11.18 of the AOC By-Law provides as follows:  
*The power of the CAS panel to review the facts and the law pursuant to Rule 57 of the Code of Sports Related Arbitration will be initially limited to determining whether the appellant has made out one or more of the grounds of appeal pursuant to clauses 11.10 or 11.16 as appropriate. If the CAS panel so determines in favour of the appellant, the hearing will then only proceed as a hearing de novo confined, in the case of a dispute as to nomination or non-nomination of an Athlete, to a hearing as to whether one or more of the grounds of appeal pursuant to clause 11.5 have been established and subject to the CAS panel observing the requirements of clause 11.19.*
6. Clause 11.5 of the AOC By-Law provides as follows:  
*The sole grounds for any appeal to an Appeals Tribunal are that:*
  - (1) *the applicable Nomination Criteria have not been properly followed and/or implemented; or*
  - (2) *the Athlete was not afforded a reasonable opportunity by the NF to satisfy the applicable Nomination Criteria; or*
  - (3) *the nomination decision was affected by actual bias; or*
  - (4) *there was no material on which the nomination decision could reasonably be based.*
7. Clause 11.19 of the AOC By-Law provides as follows:  
*If CAS determines to uphold any appeal in respect of the nomination or non-nomination of an Athlete, it will as a matter of usual practice refer the question of re-nomination back to the relevant NF selection panel for determination in accordance with the applicable Nomination Criteria. CAS may itself conclusively determine the issue of nomination or selection of Athletes:*
  - (1) *in the case of an appeal against nomination or non-nomination to the AOC where CAS:*
    - (a) *has determined that:*

- (i) *it would be impractical to refer the question of nomination or non-nomination back to the NF in the time available in which entries to the Games must be submitted by the AOC;*  
*or*
- (ii) *that there has been such a disregard of the Nomination Criteria by or on behalf of the NF that a reasonable person could reasonably conclude that it is unlikely the Nomination Criteria will be properly followed and/ or implemented; and*
- (b) *prior to making the determination in paragraph (a), has advised the parties and all persons whose interests may be affected by the outcome of the appeal of:*
  - (i) *the possibility of it making such a determination; and*
  - (ii) *that it may itself conclusively determine the issue of nomination of Athletes; and**permitting the parties and all such persons the opportunity to make submissions and give evidence in respect thereof;*

*and*

- (2) *in the case of an appeal against selection or non-selection by the AOC, where CAS has advised the parties and all persons whose interests may be affected by the outcome of the appeal of the possibility that it may itself conclusively determine the issue of selection of Athletes and permitting the parties and all such persons the opportunity to make submissions and give evidence in respect thereof.*

### **Nomination criteria**

8. Nomination to the AOC for selection in the 2008 Australian Olympic Team in the Men's Kayak Flatwater Category is governed by the 2008 Australian Olympic Team Australian Canoeing Nomination Criteria: Canoe Kayak Flatwater (*Nomination Criteria*).

9. Clause 3 of the Nomination Criteria provides as follows:

*For the purposes of nomination to the AOC of individual athletes for selection to the 2008 Australian Olympic Team Australian Canoeing will:*

...

(6) *only nominate those athletes who to the satisfaction of Australian Canoeing have competed in the Nomination Trials as follows:*

a) *Men's Kayak Olympic Nomination Trial 1, March 12-16 2008, SIRC, NSW*

...

*and*

b) *Men's Kayak Olympic Nomination Trial 2, March 25-27 2008, SIRC, NSW*

...

10. Clause 4 of the Nomination Criteria provides as follows:

...

(1) *In considering the performances of athletes at the Nomination Trials required under clauses 1(5), 3(6) and 3(7) of this Nomination Criteria the Australian Canoeing Selection Panel may in its discretion*

*give weight to extenuating circumstances. The Australian Canoeing Selection Panel is in no way obliged to consider or give weight to any extenuating circumstances.*

- (2) *For the purposes of this clause 4, "extenuating circumstances" means an inability to compete and/or attend the Nomination Trials arising from:
  - (a) *injury or illness;*
  - ...
  - (3) *Athletes unable to compete at the Nomination Trials must advise Australian Canoeing's Chief Executive Officer in writing of this fact and the reasons before the commencement of any of the affected Nomination Trials required under this Nomination Criteria.*
  - (4) *In the case of illness or injury, athletes will be required to undergo a medical examination by a doctor or doctors nominated by Australian Canoeing.*
  - (5) *A decision in each case of extenuating circumstances will be made by the Australian Canoeing Selection Panel on an individual basis. Any such decision will not be binding on the AOC.**

## **Decision**

11. In my opinion, these arguments on behalf of AC are unconvincing in the present circumstances. It is obvious that, if the matter was sent back to the same AC Selection Panel, they would deal with the matter with some urgency in view of the practical situation. The task to be performed was not simply mathematical, but included issues of evaluation and judgment concerning the situation of both the Appellant and Mr Clint Robinson in circumstances where the bias that was found was in favour of having Mr Clint Robinson included in the team. The decision would be made in a highly charged atmosphere with close public attention.
12. The inference that the bias which existed could not be entirely eradicated in those circumstances is irresistible. That is why a decision is never remitted to a biased decision maker absent compelling necessity (*Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70). In fact, the second selection took place on the day following the successful appeal and remission and with the same result.
13. There was no compelling case of a necessity here. The AC Selection Panel was defined in the Nomination Criteria as meaning "the persons appointed from time to time by Australian Canoeing to conduct the selection of athletes comprising" (the names of the three members of the then AC Selection Panel are set out). The provision must be given an ambulatory operation, with the three named persons comprising the AC Selection Panel for the time being until there is another appointment. In my view, AC had the ability to nominate another AC Selection Panel for the purpose of nominations for selection in the 2008 Australian Olympic Team in the Men's Kayak Flatwater Category. It follows that the error of sending the matter back to the same AC Selection Panel necessarily infected the second process with bias and the AC Appeals Tribunal was in error in not so finding in the Second Tribunal Decision.

14. In some circumstances, the failure to object to what was done – in this case by not appealing against the first decision – might prevent a party from relying upon a claim of bias later, particularly if it appears that that course was taken to gain some tactical advantage. In this case, however, the speed with which events moved made the opportunity to appeal more apparent than real and the Appellant should not be estopped on that basis. In any event, as I have said, the error flows through to the Second Tribunal Decision.
15. It was submitted for the Appellant that, once error has been demonstrated, the CAS should then embark upon a hearing *de novo* to consider the merits of the matter and make the selection itself. That course was opposed by the Respondent and was not supported by the Affected Parties. Counsel for the Appellant referred to the decision CAS 2000/A/293, where the CAS made a substantive decision as to nomination.
16. Clause 11.19 of the AOC By-Law makes it clear that the usual practice would be to refer the question of renomination back to AC. It is not impractical to refer the question back to AC. Therefore, the CAS could only go ahead in the present case if it determined that “there has been such a disregard of the Nomination Criteria by or on behalf of the NF that a reasonable person could reasonably conclude that it is unlikely the Nomination Criteria were properly followed and/or implemented”. I was not able to so determine in the present case. CAS 2000/A/293 was a special case which turned upon the acute time pressures involved in the circumstances that existed in that case.
17. Therefore, the appropriate result was that the question of renomination to the AOC by AC for selection in the 2008 Australian Olympic Team in the Men’s Kayak Flatwater Category should be referred back to a newly constituted AC Selection Panel. That panel, of course, can be superseded and another appointed for other purposes once that task is completed.
18. As neither party sought an order for costs, no order was made.

**The Court of Arbitration for Sport rules:**

1. The appeal is allowed.
2. The Second Tribunal Decision of the AC Appeals Tribunal dated 23 April 2008 is set aside.
3. In lieu thereof:
  - (a) the Second Panel Decision of the AC Selection Panel of 16 April 2008 is set aside; and
  - (b) the question of re-nomination to the AOC for selection in the 2008 Australian Olympic Team in the Men’s Kayak Flatwater Category is referred back to a newly constituted AC Selection Panel for determination in accordance with the Nomination Criteria.
4. There is no order as to costs.