

BETWEEN MONIQUE DELL

Appellant

AND NEW ZEALAND OLYMPIC COMMITTEE

Respondent

AND ATHLETICS NEW ZEALAND

Interested Party

AND KRISTIE BAILLIE

Interested Party

**REASONS FOR DECISION OF SPORTS TRIBUNAL
DATED 23 July 2014**

Tribunal: Alan Galbraith QC (Deputy Chairperson)
Ron Cheatley
Rob Hart

Present: Graeme Dell, representing Monique Dell
John Rooney, counsel for New Zealand Olympic Committee
Simon Wickham, New Zealand Olympic Committee
Tara Pryor, New Zealand Olympic Committee
Paul David QC, counsel for Athletics New Zealand
Shaun Maloney, counsel assisting Paul David QC
Linda Hamersley, Athletics New Zealand
Graham Seatter, Athletics New Zealand
John Wiltshire, counsel for Kristie Baillie
Kelly Diprose, representing Kristie Baillie

Registrar: Brent Ellis

1. This appeal on behalf of Monique Dell was brought against her non-selection for the women's 4x400m relay team for the Commonwealth Games to be held at Glasgow commencing on 23 July 2014. Because Ms Dell's non-selection resulted in the selection of Kristie Baillie as the sixth member of the relay squad the appeal was also a challenge to that selection. The appeal raised issues both of jurisdiction and substance.
2. The appeal was heard by way of a telephone conference on 18 July 2014. As a consequence of that hearing the Tribunal determined that the appeal had not succeeded. The parties were advised of the determination on 18 July 2014 with these reasons to follow.

Background

3. Ms Dell has been in the forefront of New Zealand women's 400 metre running for a number of years. In 2009 she set a personal best of 51.88 seconds. However, she did not compete much over 400 metres in the next couple of years but in the 2013 season she ran 13 400 metre races. In July 2013 she ran times of 54.09 seconds, 53.88 seconds and 54.19 seconds.
4. July 2013 was within the qualification period for selection for the individual 400 metres for the Commonwealth Games but those times, although very creditable, were outside the individual qualifying criteria. Accordingly Ms Dell's opportunity to compete at the Commonwealth Games was limited to the 400 metres relay.
5. New Zealand's ability to enter a team in the 400 metre relay depended upon a New Zealand relay team achieving the Commonwealth Games relay qualification standard of 3 minutes 36.50 seconds during the qualification period of 1 January 2014 to 25 May 2014. This was achieved by a team of Louise Jones, Brooke Cull, Zoe Ballantyne and Kristie Baillie who ran a time of 3 minutes 35.60 on 19 April 2014.
6. However, being the member of a relay team that achieves the qualifying standard does not result in the automatic selection of those team members for the Commonwealth Games. Selection for the Games is in the hands of the New Zealand Olympic Committee (NZOC) after nomination by Athletics New Zealand. The policies and criteria for selection for the Games are set out in a number of documents – the NZOC 2014 Glasgow Commonwealth Games Selection Policy, the NZOC/Athletics New Zealand Agreement, the 2014 Commonwealth Games

Athletics Nomination criteria, the athlete application form and the athlete agreement between the athlete and the NZOC.

7. The essence of Ms Dell's appeal was that the policies and criteria in those agreements have not been correctly applied and that, as a result, she had been prejudiced and/or that if properly applied she should have been selected and/or that the selection decision was biased.
8. The relief sought was that Ms Dell should remain as a nominated athlete with her selection pending subject to proof of her form which would be considered only at the Village pre-entry camp.

Facts

9. After the qualifying time was achieved in April 2014 the Athletics New Zealand selectors turned their attention to choosing the athletes to make up the Commonwealth Games squad. Once qualified New Zealand was entitled to select up to six athletes for the relay squad.
10. On 1 May 2014 the Athletics New Zealand selectors nominated three athletes – Louise Jones, Zoe Ballantyne and Brooke Cull - and noted that this left three places open for later nomination/selection "which would allow athletes such as Monique Williams/Dell the maximum period to return to full fitness after a period of injury". NZOC then selected Louise Jones and Zoe Ballantyne to the Commonwealth Games team. Brooke Cull was not selected at that time as her nomination was conditional upon her inclusion in the "long list" for drug testing purposes.
11. On 28 May the Athletics New Zealand selectors nominated the final four members of the women's' 4x400m relay team. The nominations were Brooke Cull, Katherine Camp, Portia Bing and Monique Dell, with Ms Dell's nomination said to be "subject to proving form and fitness" prior to 30 June. The selectors also nominated Kristie Baillie as first reserve and Ellie McCleery as second reserve.
12. Scott Goodman, the high performance director for Athletics New Zealand, met with the New Zealand based 4 x 400 squad members, who included Kristie Baillie, and the relay squad coach on 31 May. At that meeting he explained the Athletics New Zealand nominations and the reason that Ms Dell was being given until 30 June to prove that she was running well. It was unanimously agreed that giving Ms Dell more time was sensible as if she was running well she would add to the competitiveness of the relay team in Glasgow.

13. On 3 June 2014 NZOC advised Mr Seatter, the convenor of the Athletics New Zealand selectors, as follows:

I am now in a position to advise the NZOC Selection Panel has endorsed the following athletes for selection into the Glasgow 2014 Games Team:

- *Julian Matthews – 1500m*
- *Lucy Van Dalen – 5000m*
- *Nikki Hamblin – 1500m*
- *Additions to the Women’s 4 x 400m relay team: Brooke Cull, Katherine Camp and Portia Bing. Please note that Monique Dell’s selection will be confirmed subject to meeting specific performance objectives prior to 30 June 2014.*
- *Reserves for the Women’s 4x 400m relay team: Kristie Baillie, Ellie McCleery (in that order).*

As with previous selections, would you please advise the athletes of their selections and this will be followed up with a formal selection letter from the NZOC next week. Alex and Ashley will liaise with Brett on the joint media announcement and social media content.

14. That advice was followed by a NZOC media release on 4 June 2014 which in respect to Ms Dell said:

“Monique Dell will be confirmed as selected in the relay squad subject to form and fitness requirements being met... The naming of these athletes brings to total number selected in the athletics team to 20 with the potential to grow to 23 if Dell and decathletes Brent Newdick and Scott McLaren satisfy the selectors’ requirements to prove their fitness and form.”

15. On 4 June Mr Seatter wrote to Ms Dell advising her of a requirement to meet a performance standard of a 400 metres in a time of 54.25 seconds by 30 June 2014 in order for her to be confirmed as selected.
16. The NZOC selectors at the same time had confirmed the selection of Kristie Baillie as first reserve and Ellie McCleery as second reserve. Those selections were also stated in the NZOC media release.
17. On 14 June Monique Dell ran a time of 58.68 seconds and on 28 June a time of 58.71 seconds. On 28 June Kristie Baillie ran a time of 54.69 seconds.
18. On 30 June Scott Goodman had a Skype chat with Ms Dell. He advised her that the Athletics New Zealand selectors would be making a decision within the following 24 hours as to whether or not to recommend to the NZOC that her 58.71 seconds time had fulfilled the proof of form requirement.
19. On 2 July Mr Seatter advised the NZOC selectors of Ms Dell’s two performances and noted that she had failed to achieve the fitness and form requirements

communicated to her. He asked that the NZOC selectors advise their decision regarding Ms Dell's selection to him as soon as possible. In a subsequent email on the same day he asked that if the NZOC selectors' decision was not to select Ms Dell then Athletics New Zealand wished to nominate Kristie Baillie as the sixth member of the relay team.

20. On 3 July 2014 Scott Goodman had a further Skype chat with Ms Dell. He informed her that there would be a formal announcement on 4 July that Kristie Baillie would be the sixth athlete selected for the relay team. He also advised Ms Dell that the formal announcement on 4 July at 12 noon would be the trigger for the 48 hour timeframe to lodge an appeal to NZOC. On the same day Scott Goodman also rang Chris Williams, Monique Dell's father and coach of the relay squad, to advise him of the decision which had been made by the NZOC.
21. The NZOC media announcement was made as scheduled on 4 July at 12 noon.
22. On 24 June there had been a communication to Scott Goodman from Graeme Dell, husband of Monique Dell, in which he had taken issue with the processes undertaken to that date by Athletics New Zealand and the NZOC. After the NZOC media release on 4 July he gave notice of appeal to NZOC on behalf of Monique Dell "against her de-nomination ... in accordance with NZOC/ANZ Agreement 10.3". That led to an exchange of emails between Graeme Dell and the NZOC culminating in a formal notice of appeal under clause 10.5 against non-selection being lodged by Graeme Dell on his wife's behalf on 8 July 2014.
23. Regrettably two communications from NZOC dated 7 and 8 July contained an incorrect interpretation of the nomination criteria and the assertion that Ms Dell had not satisfied the criteria for nomination to the relay team. That misinterpretation of the criteria asserted by the NZOC did not assist the clarity of subsequent communications. This misinterpretation does give some weight to Mr Dell's submission that selection criteria should be unambiguous if athletes are to be fairly informed as to the standards they are required to meet. However, being subsequent to the relevant period concerning Ms Dell's non-selection, these incorrect communications do not affect the substance of Ms Dell's appeal.

Issues Arising from Submissions

24. As previously noted, the essence of the appeal challenged the application of the policies and criteria contained in the selection documents. Mr Dell, who presented the submissions in support of the appeal, contended, inter alia, that:

- (a) The process adopted prejudiced Ms Dell because of uncertainty as to whether she had been nominated.
 - (b) There was no power to impose a performance standard – any question of fitness/performance could only be dealt with under clause 11.1(g) of the Nomination Criteria assessment at the Village pre-entry camp.
 - (c) The imposition of a performance standard was unreasonable.
 - (d) The selection process was biased in a number of respects including that Kristie Baillie had not been subject to the same performance requirement as Ms Dell.
25. Mr Rooney who appeared as counsel for NZOC acknowledged the interpretation error in the NZOC's communications of 7 and 8 July and, in summary, submitted:
- (a) That the Tribunal lacked jurisdiction to determine the appeal because as a selection appeal it had not been made within two days of the media announcement at 12 noon on 4 July 2014.
 - (b) In any event, the NZOC selectors were entitled to accept the performance recommendation of the Athletics New Zealand selectors and impose a performance requirement as a condition of selection under clause 8.6 of the NZOC/ANZ agreement.
 - (c) No question of bias arose and the selection of Kristie Baillie necessarily followed from the non-selection of Ms Dell because Kristie Baillie had already been selected as first reserve.
26. Submissions were also made by Paul David QC on behalf of Athletics New Zealand, again in summary:
- (a) That the NZOC's selectors' decision on 3 June 2014 was a conditional selection of Ms Dell subject to meeting the specific performance requirement by 30 June 2014 and therefore was a selection decision under clause 8.6 of the NZOC/ANZ agreement.
 - (b) That as Ms Dell had not met that performance requirement it was within the discretion of the NZOC selectors not to confirm Ms Dell's selection.
 - (c) That there was no unfairness in Kristie Baillie not being subject to a similar performance requirement because her nomination and selection as first

reserve had been made on the basis of recent performances ranking her as the 6th fastest squad member, and, with Ms Dell's selection not being confirmed, the NZOC selectors acted appropriately in promoting her from first reserve to fill the vacancy in the relay squad.

27. Mr Wiltshire, as counsel for Kristie Baillie, supported the submissions made on behalf of NZOC and Athletics New Zealand and placed emphasis on the recent performances of Kristie Baillie as against Ms Dell's recent performances as being factors which the NZOC selectors were entitled to take into account.

Discussion

28. As earlier noted, a degree of confusion was introduced into this appeal by references to nomination criteria and qualifying periods which were not relevant. The only relevant criteria and qualifying period in respect to a relay team was that between 1 January 2014 and 25 May 2014 any relay team had to meet a criteria that showed the capability of achieving a top six placing, which for the 4x400m women's relay was assessed at a time of 3 minutes 36.50 seconds, that athletes selected to compete in an individual event corresponding to a relay team had to be selected among the six athletes for the respective relay team and that nomination for relay events took precedence over individual events.
29. Accordingly, and correctly, the Athletics New Zealand selectors concentrated upon nominating the six runners who they considered would have the best potential to perform at the highest level in the women's 4x400m relay event. In doing so they were not restricted to considering performances within any particular period of time but obviously focused on nominating athletes who they believed would be capable of the best relative performances at the Commonwealth Games commencing on 23 July 2014.
30. Mr Seatter's evidence detailed the considerations which the selectors took into account in nominating the selected athletes, including in nominating Monique Dell on 28 May 2014 subject to satisfactory demonstration of her "form and fitness". He explained that the selectors were looking for athletes who had the potential to run in the region of 54.20 seconds at the Games and faster than 54.40 seconds which was the adjusted average time of the team members when the qualifying time was recorded. It was on that basis that the selectors identified a performance requirement of 54.25 seconds to support Ms Dell's selection.

31. The NZOC selectors are responsible for the selection of all athletes nominated for the Games in all disciplines and in all events. Accordingly they are necessarily dependent on the information supplied and recommendations made to them by the selectors for the particular sports who have the greater experience and knowledge of that sport.

32. The NZOC/ANZ agreement for the Commonwealth Games includes clause 8.6:

Selection May Be Subject to Conditions: *The NZOC may select a Nominated Athlete with conditions to be satisfied by a date prior to the commencement of the Games, as determined by the NZOC. If such conditions are met by the specified date, that Nominated Athlete shall be selected to the Games Team.*

33. In the Tribunal's view what happened here was that Monique Dell was nominated by Athletics New Zealand on 28 May 2014. It is correct that the nomination was said to be "subject to proving form and fitness", the reasons for which were explained in some detail in the nomination email forwarded by Mr Seatter to NZOC. Much was made at the hearing of the term "conditional nomination". In the Tribunal's view that description does not affect the position that Ms Dell was nominated with what was, in effect, a recommendation that her selection should be subject to a condition of the nature that clause 8.6 contemplated.

34. In making their selection decision the NZOC selectors were not bound to select Ms Dell because she had been nominated, nor were they bound by any performance recommendation by the Athletics New Zealand selectors, nor were they prevented from imposing a performance requirement of their own. In the Tribunal's view the NZOC selectors did select Ms Dell, as a consequence of the Athletics New Zealand nomination, but adopted as a condition under clause 8.6 a performance requirement. The NZOC selectors, in the Tribunal's view, were entitled to adopt as the performance requirement a time specified by the Athletics New Zealand selectors who had the particular expertise and knowledge. In the same way and at the same time, the NZOC selectors imposed similar performance requirements on two decathletes, both of whom subsequently achieved those performances and were then confirmed as selected athletes in the Games team.

35. The Tribunal's interpretation of the 28 May nomination process, the NZOC selectors' decision, and the selection announcement by the NZOC on 3 June 2014 is that the NZOC selectors had made a conditional selection of Monique Dell subject to her achieving the specific performance standard by 30 June 2014. That

interpretation is confirmed by the evidence of the convenor of NZOC selectors, Mr Wickham, given before the Tribunal.

36. The Tribunal is also satisfied that the communication by Mr Seatter to Ms Dell on 4 June 2014 fairly informed her of the substance of the decision. It concluded:

"If you achieve this level of performance by 30th June [54.25] you will be added to the team in the 6th place in the relay squad.

If you fail to achieve this level of performance before the end of June, the sixth place will be given to the first reserve.

Please feel free to come back to me with any questions that you may have."

37. It would have been preferable if Mr Seatter's advice had been accompanied by written advice by NZOC of Ms Dell's conditional selection. Clause 8.8 of the NZOC/ANZ Agreement requires advice of any selection. Presumably NZOC took the view that a selection subject to performance was not a selection until confirmed. However, this was a selection decision of the NZOC selectors, publicly released by NZOC, with a condition imposed under the authority of the NZOC selectors. As it was, NZOC left it to Mr Seatter to communicate with Ms Dell. Much that was argued before the Tribunal would not have been in debate had NZOC provided that written advice. That is a lesson for the future.
38. Having said that, the Tribunal's view is that the communications which took place did in fact fairly inform Ms Dell as to what was expected of her if she was to be confirmed as a member of the relay squad. There was at the time no disagreement voiced by Ms Dell at the imposition of that requirement. Indeed media reports at the time which included quotes expressed to be by Ms Dell can only be interpreted as an acceptance of the requirement and her confidence that she would meet that standard. Ms Dell did not give evidence before the Tribunal and accordingly the appeal lacked any direct evidential foundation for Mr Dell's submission that the ANZ/NZOC communications had in any way misled Ms Dell.
39. It was not until after Ms Dell ran a time of 58.68 seconds on 14 June that any question was raised about the imposition of the requirement in the email of 24 June from Mr Dell to Mr Goodman. In that email Mr Dell focused on a claimed inability of the Athletics New Zealand selectors to impose any performance requirement and asserted that once nominated the athlete should then be selected only subject to proof of fitness under clause 11.1 of the Nomination Criteria Village pre-entry camp.

40. As previously discussed, the Tribunal's view is that Ms Dell had in fact been conditionally selected and accordingly that clause 8.6 applied. The clause 11.1 fitness requirement to be assessed at the Village pre-entry camp is a condition applied to all selected athletes. It is additional to and not in place of any specific performance requirement imposed under clause 8.6.
41. The Tribunal has already described the NZOC determination on 3 July not to select Ms Dell to the relay squad as a result of her not meeting the performance requirement. As a consequence Kristie Baillie was selected as the sixth member of the relay team. Mr Dell, in his submissions, argued that Ms Baillie's selection was not in compliance with Athletics New Zealand/NZOC's policies and criteria, including that Ms Baillie had not been made subject to the same performance criteria as Ms Dell.
42. In fact Ms Baillie had been nominated on 28 May and selected on 3 June as first reserve. Her selection as first reserve was not conditional because she had the sixth fastest recent 400m time which, in the selectors' view, justified her selection as first reserve. Indeed by the time she was promoted to the relay squad she had run a time of 54.69 seconds on the same day, but at a different meeting, that Ms Dell ran 58.71 seconds.
43. In the Tribunal's view Ms Baillie was correctly nominated and selected as first reserve, then by Ms Dell's non-selection, correctly selected as the sixth member of the relay team. Again in the Tribunal's view there was no bias in Ms Baillie's selection, indeed her initial selection as first reserve and the advice to Ms Dell in Mr Seatter's email of 4 June could not have been more transparent.
44. For those reasons the Tribunal is satisfied that Ms Dell has not been prejudiced by the processes followed and decisions made by Athletics New Zealand and the NZOC which in fact allowed her an extension of time to prove her fitness and that Ms Dell's appeal against her non-selection accordingly does not succeed.

Jurisdiction

45. The NZOC in opposition to the appeal also raised a jurisdictional objection. The terms of the NZOC/ANZ Agreement, by which an athlete is bound, provided for nomination and selection appeals. Both clause 10.3 applying to nomination appeals and clause 10.6 applying to selection appeals require written notice of the appeal to be given to the Chief Executive of Athletics NZ (for nomination appeals) or the Secretary-General of the NZOC (for selection appeals) within two days of

the nomination or selection date. The selection date is defined as the date on which the NZOC publicly announces which athletes have been selected. The relevant date and time in respect to Ms Dell's situation was 4 July at 12 noon.

46. The issue is whether the email from Mr Dell in the early evening of 4 July constituted a valid notice. That email said:

"On the authority if (sic) my wife Monique Dell I hereby give Notice to Appeal against her de-nomination to NZOC for the 2014 Commonwealth Games team in accordance with NZOC/ANZ Agreement 10.3.

This is an extraordinary sequence of events and procedural irregularities which is currently not provided for within the Agreement or your Criteria/Policy, but in order to protect the legality of the timeline we reference 10.3(a). Technically the Nomination Date has passed and Scott Goodman advises the athlete has not been 'selected' and consequently 10.6 may not apply.

In order that we may follow procedure correctly please advise if you intend to enact 10.3(b)."

47. The difficulty with this email which NZOC points to is that it purports to be a notice of appeal against de-nomination when in fact, as was subsequently lodged, the notice of appeal should have been against non-selection under clause 10.5 of the NZOC/ANZ Agreement.
48. That email notice was shortly followed by an email from Monique Dell confirming that Graeme Dell, as her husband, was authorised to lodge and process the appeal on her behalf.
49. It is surprising that the notification of appeal on 4 July was directed at de-nomination rather than non-selection given the advice which Scott Goodman had provided to Ms Dell in his Skype chat with her the previous day. At the hearing of the appeal Mr Dell submitted that this confusion was caused by the lack of specific advice to Ms Dell by Athletics New Zealand of her nomination. As the Tribunal has noted above, its view is that the communications and media releases were sufficient to identify for Ms Dell that she was in the relay team subject only to confirmation once she had met the performance requirements. However, as is evident from Mr Dell's email of 4 July he at least was confused as to the correct basis for an appeal.
50. The Tribunal appreciates the reasons why such a short timeframe is allowed for both nomination and selection appeals. It is of the nature of these processes that they take place relatively shortly before a competition event and any appeal of this type must be disposed of with urgency. However, it is also important that an

athlete's right to appeal a decision which may be adverse to possibly years of endeavour should be appropriately recognised.

51. In the Tribunal's view Mr Dell's email of 4 July should appropriately be interpreted as giving sufficient and substantive notice of appeal. There could be no doubt that the appeal was a consequence of and against the NZOC decision which had been publicly announced that day of the remaining members of the relay team excluding Ms Dell. The NZOC acknowledged the Dell emails on 4 July without objection and there was no further communication from the NZOC until 7 July when the first email misstating the nomination criteria was sent.
52. The principle we have applied to interpreting Mr Dell's email is consistent with the approach of the House of Lords in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 which has been adopted in a number of subsequent cases. The House of Lords held that the interpretation of notices has to be approached objectively and the question was how a reasonable recipient would have understood such a notice. The Tribunal has approached the interpretation of Mr Dell's notice of appeal in the same way that it has approached the interpretation of the previous communications to Ms Dell as questions of substance not form. The Tribunal believes this to be the appropriate approach in a sports context.
53. Accordingly the Tribunal does not uphold the NZOC jurisdiction objection. However, as already determined, the appeal does not succeed on its merits.

DATED 23 July 2014



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A R Galbraith
(Deputy) Chair