

**BETWEEN**                                    **LUKAS WALTON-KEIM**

**Appellant**

**AND**                                         **YACHTING NEW ZEALAND**

**Respondent**

**AND**                                         **NEW ZEALAND OLYMPIC COMMITTEE**

**Interested Party**

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**REASONS FOR RESULTS DECISION OF SPORTS TRIBUNAL GIVEN ON 29 MAY 2024**

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**Hearing**                                    27 May 2024 in-person

**Present**                                    William McCartney, counsel for Appellant  
Lukas Walton-Keim, Appellant (remote attendance)  
John Rooney and Matthew Austin, counsel for Respondent  
David Abercrombie, CE Yachting New Zealand, Respondent  
Tara Pryor, NZOC

**Tribunal**                                    Warwick Smith, Chair  
Ruth Aitken DNZM  
Pippa Hayward

**Registrar**                                   Helen Gould

1. On 2 May 2024, Mr. Walton-Keim (the appellant) filed an appeal to the Sports Tribunal (Tribunal) against the decision of the respondent Yachting New Zealand (YNZ) not to nominate him for selection by the New Zealand Olympic Committee (NZOC) for the Men's Kite Foil event at the 2024 Paris Olympic Games.
2. The grounds for appeal were that YNZ had not properly followed and/or implemented the applicable nomination policy.
3. On 29 May 2024, the Tribunal delivered a results decision, in which it concluded that the applicable nomination policy was properly followed and/or implemented by YNZ, except to the extent there were one or more errors of fact which may have affected the nomination decision.
4. The Tribunal upheld the appeal for that reason, and referred the question of nomination back to YNZ for determination using the correct facts in relation to one issue, namely the quality of the field at the second Selection Regatta, the 2023 European Championships.
5. What follows are the reasons for that decision.

### *Background*

6. The appellant is New Zealand's leading kite foiler who has been competing professionally in international competitions for five years. He started kite surfing at the age of 7, and took up kite foiling in 2016.
7. Kite foiling is making its debut at the 2024 Paris Olympics, and the appellant secured an Olympic spot for New Zealand at the 'Sail Sydney' regatta in 2023. However, earning a spot for New Zealand was not a guarantee that the appellant would be selected to go to the Olympics.
8. Selection to the New Zealand Olympic Team is a two-stage process. First, an athlete is required to meet the eligibility and nomination criteria of his or her National Sporting Organisation (NSO) - in this case YNZ - which have been approved by NZOC. If the athlete meets the eligibility and nomination criteria, they may be nominated by the NSO to NZOC, who will make the final selection decision.

## *YNZ 2024 Paris Olympics Nomination Criteria*

9. YNZ's criteria for the Paris 2024 Olympic Games were set out in a document called the "YNZ 2024 Paris Olympics Nomination Criteria" (Criteria). The Criteria generally set out eligibility criteria and standards sailors must meet to qualify for nomination (to NZOC) for the Olympics.

### Eligibility

10. The eligibility criteria were set out in clause 9 of the Criteria. The sections of clause 9 which are most relevant to this appeal are subclauses 9.1(g) and (h), set out below:

#### **9. ELIGIBILITY AND CONDITIONS**

**9.1 Eligibility Requirements:** To be eligible, Sailors / Crews must:

- (g) have finished in the top ten places in at least one Selection Regatta in the class that they are intending to sail at Paris 2024 or have had a top three (3) placing at either of the 2022 or 2023 World Sailing Class Championships in order to be considered under the primary objective set out in clause 4.1; or
- (h) have finished in the top 16 countries / nations in at least one Selection Regatta in the class that they are intending to sail at Paris 2024 to be considered under the secondary objective set out in clause 4.2.

### Objectives

11. The primary and secondary objectives referred to in subclauses 9.1 (g) and (h) above were the following:

#### **4. OBJECTIVES**

**4.1 Primary objective:** The primary objective of the YNZOC is to nominate a Sailor and/or Crew who, in the YNZ Selectors' view, is / are capable of winning a medal at Paris 2024.

**4.2 Secondary objective:** The secondary objective of the YNZOC, where the primary objective cannot be fulfilled, is to consider nominating a Sailor and/or Crew who, in the YNZ Selectors' view, is / are an emerging talent in their respective class with the:

- (a) capability to secure a top 16 placing at Paris 2024; and
- (b) potential to win a medal at the Los Angeles 2028 Olympic Games.

In this case, it is common ground that the appellant did not satisfy the Primary Objective in clause 4.1. If he were to qualify for nomination, he needed to satisfy the selectors that he met the Secondary Objective in clause 4.2.

### Factors to be considered for nomination

12. Clause 11 of the Criteria sets out the factors the selectors were required to consider when making recommendations for nominations. Clause 11 is set out in full below:

#### **11. RECOMMENDATION FOR NOMINATION**

**11.1 Factors to be considered:** The YNZ Selectors will, when considering whether to recommend a Sailor or Crew for Nomination to the YNZOC, consider the following:

- (i) **Overall Results:** The overall results and performances of a Sailor or a Crew at the end of the designated Selection Regattas based on the lowest combined overall finish placings. For example, where there are two (2) Selection Regattas designated for a Class, a 4th and 5th placing beats a 3rd and 7th placing.
- (ii) **Weighting:** The weighting given to Selection Regattas. For this factor to apply, the Sailors / Crews and the relevant YNZ Selectors in any given Class, when meeting pursuant to clause 10.1, must all agree on the Regattas (if any) that are to be given a higher weighting (with any such agreement being subject to YNZOC approval).
- (iii) **Primary and Secondary Objectives:** whether the Sailor or Crew meet the primary or secondary objectives outlined in clauses 4.1 and 4.2 (having met one of the eligibility requirements set out in clause 9.1(g) or clause 9.1(h), as applicable).

**11.2 Additional Factors:** The YNZ Selectors may also consider the following additional factors (giving such relevance and weight as they shall determine):

- (a) Conditions encountered during any Selection Regattas compared to expected conditions in Marseille during Paris 2024.
- (b) A Sailor or Crew's track record of success at past Olympic Games and/or previous World Sailing pinnacle regattas.
- (c) Any Extenuating Circumstance passed through to the YNZ Selectors pursuant to clause 12.
- (d) Any other factor that the YNZ Selectors consider to be relevant.

**11.3 Timing of recommendation for Nomination:** The YNZ Selectors may, at any time after the second Selection Regatta for a given Class, recommend for Nomination a Sailor or Crew to YNZOC who they consider to be a standout performer. For clarity purposes, this decision may be made before all of the Selection Regattas have been completed.

**11.4 Nomination with Conditions:** The YNZ Selectors may recommend for Nomination (and the YNZOC may Nominate) a Sailor or Crew with conditions; for example, conditions relating to recovery from injury or continuing to meet specified performance levels. If the conditions are not met to the satisfaction of the YNZOC, then the affected Sailor or Crew will not be eligible for selection by the NZOC (unless the NZOC decides to select the Sailor or Crew subject to those or other conditions).

**11.5 Notification:** The CEO of YNZ will notify Sailors or Crews whether or not they have been nominated by the YNZOC). It should be noted that receiving notification of Nomination pursuant to this clause will not in itself guarantee Selection by the NZOC.

### Selection Regattas

13. The designated “Selection Regattas” for each sailing discipline, referred to in paragraph 11 above, were generally agreed between YNZ and the sailors who would be seeking nomination in that discipline, at or following a meeting of YNZ personnel and the sailors held in December 2022. The appellant missed that meeting but did not express any disagreement with the Selection Regattas proposed for the Men’s Kite Foil event.

### Regattas that were proposed for the kite foiling discipline.

14. The appellant’s Selection Regattas would be the 2023 World kite foiling Championships, the 2023 European Championships, and the 2024 European Championships.
15. There was no agreement at or following the December 2022 meeting that any of the Selection Regattas would carry greater or lesser weight than the others.

### Selection Regatta results

16. The appellant placed 28<sup>th</sup> overall and 17<sup>th</sup> by country in the first Selection Regatta (the 2023 World Championships), 17<sup>th</sup> overall and 12<sup>th</sup> by country in the second selection Regatta (the 2023 European Championships), and 27<sup>th</sup> overall and 21<sup>st</sup> by country in the third Selection Regatta (the 2024 European Championships). The appellant says he was hampered by ongoing issues with a knee injury in the lead up to the first Selection Regatta, and unwell in the lead up to the third Selection Regatta. Although he did not formally apply under clause 12 of the Criteria for consideration of these difficulties as “Extenuating Circumstances”, he nevertheless says that they adversely affected his preparation, were known to YNZ and the selectors, and should have been taken into account in the selectors’ nomination decision (and in the Yachting New Zealand Olympic Committee’s (YNZOC) review of the selectors’ decision<sup>1</sup> not to nominate him for the Paris Olympics.

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<sup>1</sup> Referred to below at paragraphs [22] to [25].

### Selectors' decision

17. Not having finished in the top 10 places in any of the Selection Regattas, and not having had a top three placing at either of the 2022 or 2023 World Championships, the appellant was not eligible for consideration under the primary objective at clause 4.1 – clause 9.1 (g) of the Eligibility criteria. That is not contested. However, the appellant's result in the second Selection Regatta, where he achieved a 12<sup>th</sup> placing by country, meant that he was eligible under clause 9.1 (h) to be considered under the Secondary Objective in clause 4.2.
18. In applying the Secondary Objective, the selectors were required to consider not only the hard data on the appellant's results, but also a number of factors that may be fairly described as, at least in part, subjective. In particular, the selectors had to consider whether the appellant was an "emerging talent" in kite foiling, whether he had the "capability" to secure a top 16 placing at Paris 2024, and whether he had the "potential" to win a medal at the Los Angeles 2028 Olympic Games.
19. In considering these matters, the selectors were obliged to consider the various factors set out in clause 11 of the Criteria, including the additional factors set out at clause 11.2 ((a)-(d)).
20. After considering the clause 4.2 and clause 11 factors, the selectors decided that the appellant did not meet the terms of the Secondary Objective - they did not consider him to be an emerging talent who had the capability of achieving both a top 16 placing at the 2024 Olympics and a medal at the 2028 Olympics.

### Clause 7.3 of NZOC's Nomination and Selection Regulations

21. One of the appellant's contentions is that YNZ failed to comply with clause 7.3 (b) and (c) of NZOC's Nomination and Selection Regulations (the Regulations), which are concerned generally with the assessment of subjective factors in an NSO's nomination decisions. Subclause 7.3 reads:

**7.3 Content of Nomination Criteria:** The proposed Nomination Criteria shall clearly indicate:

(a) How objective criteria (including specified results, performances, or standards) shall be assessed in determining the nomination of Athletes.

(b) How subjective criteria, where specified, shall be assessed in determining the nomination of Athletes.

(c) How, where both objective and subjective criteria are specified, the decision whether to nominate an Athlete or not will be made.

In this case, the Criteria contained no specific provisions stating how subjective criteria were to be assessed.

### Role of YNZOC

22. The role of the YNZOC, and its relationship with the selectors, was set out in clauses 5.1(b) and 7 of the Criteria, as follows:

5.1(b) **Nomination by YNZOC:** The YNZOC will:

- (i) determine that Sailors and Crews meet the eligibility requirements set out in clause 9.1; and
- (ii) determine that Sailors and Crews have satisfied the conditions set out in clause 9.2; and
- (iii) review the YNZ Selectors' recommendations for the Nomination of Sailors and Crews on the basis that:
  - (aa) if the YNZOC is not satisfied with a recommendation, they can request that the YNZ Selectors review that recommendation; or
  - (bb) if the YNZOC is satisfied with a recommendation, they will endorse the recommendation;

### **7. YACHTING NEW ZEALAND OLYMPIC COMMITTEE**

**7.1 Sub-Committee of YNZ:** The YNZOC is a subcommittee of the board of YNZ comprising the following voting members (or such other voting members as may be appointed by the board of YNZ in the event of any necessary changes to the make-up of the YNZOC):

• John Clinton (Chair), Ashton Welsh (Convenor of Selectors / Legal Adviser), Andy Maloney, Dave MacKay, Leslie Egnot, Grant Beck and Jenny Armstrong.

**7.2 Role of YNZOC:** The YNZOC's role is to review the decision-making process of the YNZ Selectors and to make Nomination decisions pursuant to clause 5.1(b) above.

**7.3 Discretion not to Nominate:** The YNZOC has a discretion to not Nominate any Sailor or Crew in any given Class.

23. As will be seen from clause 5.1 (b) (iii) above, the role of the selectors was to make recommendations on whether particular sailors should or should not be nominated to NZOC for the Olympics. Those recommendations would be reviewed by YNZOC, and YNZOC would make the formal nominations to NZOC.

### Steps taken by the YNZOC in this case

24. YNZOC discussed the selectors' recommendation that the appellant should not be nominated, at a meeting held on 10 April 2024. It voted to ask the selectors to reconvene to consider the recommendation, as it was uncertain that one of the three selectors was still in agreement with the recommendation the selection panel had made.

25. The selectors had a further discussion following the reconsideration request from YNZOC, and they were unanimous in their decision to confirm their earlier recommendation. YNZOC accepted the selectors' reconsidered recommendation, and YNZ then informed the appellant that he had not been nominated for Olympic selection.

*The appeal*

26. The appellant submits that the respondent did not properly follow and/or implement the nomination criteria, in the following respects:
- a. non-compliance with clause 7.3 of the Regulations in relation to subjective criteria;
  - b. the selectors were not experts in kite foiling, they did not take reasonably available steps to follow the appellant's events (including by travelling internationally to watch those events), they did not keep minutes or give written reasons for their decision, and they did not adequately inform the appellant on what he would be judged by, or give him a reasonable opportunity to provide feedback<sup>2</sup> ;
  - c. the selectors wrongly gave the second Selection Regatta a lower weighting than the other two Selection Regattas, in breach of clause 11.1 of the Criteria;
  - d. the selectors made errors of fact in their analysis of the second Selection Regatta, and in failing to sufficiently consider the appellant's knee injury and illness;
  - e. The selectors and/or YNZOC misunderstood their ability to make a recommendation subject to conditions, or to add another Selection Regatta;
  - f. The selectors failed to afford the appellant equal treatment with certain athletes seeking nomination in other sailing disciplines;
  - g. YNZOC abdicated its role as decision maker to the selectors; and
  - h. Two of the selectors sat on the YNZOC and participated in the meeting of 10 April 2024, when the selectors' decision was reviewed. The two selectors should

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<sup>2</sup> Referring to the decisions of the Tribunal in *Winther and Kosinka v Yachting New Zealand*, ST 04/16 and 05/16.



not have participated in a meeting convened to consider their own earlier recommendation, and their doing so denied the appellant natural justice;

- i. If the selectors had applied the Oxford English dictionary definitions of the expressions “emerging”, “capability” and “potential”, as used in clause 4.2 of the Criteria, the appellant would have satisfied clause 4.2.

### *Hearing*

27. A one-day hearing was held before a panel of the Tribunal to determine the issue of whether YNZ did or did not properly follow and/or implement the Criteria. The appellant and his coach, Mr. Cozzolino, were both cross-examined on the statements of evidence they had provided, as was a supporting witness, Mr. Maus, a German international kite foiler who has been training with the appellant. Five witnesses who had provided statements of evidence for YNZ were also cross-examined: the chair of the selection panel Mr. Beck, the chair of YNZOC Mr. Clinton, YNZ’s High Performance director Mr. Stewart, YNZ’s Talent Development Manager Mr. Woolley, and YNZ’s CEO Mr. Abercrombie. Counsel each made opening and closing submissions.

### *Discussion and conclusions*

28. The Tribunal will address in turn each of the appellant’s issues listed at paragraph 26 above.

### Alleged non-compliance with clause 7.3 of the Regulations

29. The Tribunal does not see anything in this submission.
30. First, clause 7.3 of the Regulations is not part of the Criteria - it is a subclause in the Regulations, which is an NZOC document.
31. Clause 7 of the Regulations is concerned generally with the topic of what NSOs wanting to nominate athletes for inclusion in Olympic Games teams were required to include in their nomination criteria. Under clause 7.1, each NSO was required to submit its proposed nomination criteria to NZOC for approval, and under clause 7.4 NZOC determined whether the NSO’s proposed criteria complied with subclauses 7.2 (which dealt with various matters an NSO was required to include in its nomination criteria) and 7.3. If NZOC was satisfied that the NSO’s proposed nomination criteria

complied with subclauses 7.2 and 7.3, and were “otherwise\_satisfactory” to NZOC, NZOC would then notify the NSO that its proposed\_nomination criteria were approved.

32. In this case, it is not disputed that the Criteria were approved by NZOC.
33. After that approval, there appears to have been limited provision for the Criteria to be changed. Clause 7.6 of the Regulations provided:

**No Amendment to Nomination Criteria after approval by NZOC:** no amendment or alteration shall be made to the Nomination Criteria after the NZOC has approved the proposed nomination criteria without the written approval of the NZOC.

34. In this case, there was only one ground of appeal relied upon by the appellant, and it was that the “applicable Nomination Criteria was not properly followed and / or implemented”. In the Tribunal’s view, the only possibly “applicable” Nomination Criteria were those that had been approved by NZOC, namely the Criteria. It is not for the Tribunal in an appeal such as this to second guess NZOC’s decision to approve the Criteria, and the Tribunal did not understand Mr McCartney’s submission to go so far as to contend that the Criteria were *invalid* for failure to include the provisions required by clause 7.3 of the Regulations.<sup>3</sup> In the end, the appellant’s argument was essentially that the subjective criteria at clause 4.2 of the Criteria were insufficiently defined, making it difficult if not impossible for the selectors to apply them.
35. We reject that submission. The selectors, bringing to bear their knowledge and experience of Olympic competition and sailing generally, were well able to apply common English expressions such as “emerging talent”, “capability” to secure a top 16 placing”, and “potential” to win a medal in 2028.

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<sup>3</sup> Any finding of invalidity of the Criteria as a whole would presumably remove the essential substratum for the appeal – there would be no (valid) Nomination Criteria for the selectors to have followed or implemented.

The selectors were allegedly not experts in kite foiling, they did not take reasonably available steps to follow the appellant's events (including by travelling internationally to watch those events), they did not keep minutes or give written reasons for their decision, and they did not adequately inform the appellant of the information he was being judged on or give him a reasonable opportunity to provide feedback.

36. On the issue of the selectors' expertise in kite foiling, it was common ground at the hearing that kite foiling is a relatively new sport, and it would have been difficult to find an experienced New Zealand-based international sailor who had been a kite foiler and had detailed knowledge of the sport. YNZ met the situation by appointing a panel that had a wealth of international sailing experience, in numerous craft. There was no challenge raised by the appellant to their appointment.

37. In his evidence, YNZ's High Performance Director, Mr Stewart said that:

*"It is commonly understood that to race kites properly requires the same race craft, and awareness of all high performance boats, such as in relation to starting, holding a lane, clear air, picking wind shifts and lay lines. These are aspects not unique to the kite. I therefore do not believe that an effective selector in relation to kite foiling requires the selector to have experience in the specific event that [the appellant] is competing in."*

38. The Tribunal accepts that there are aspects of kite foiling that are unique to the sport, but it does not accept that it was or is beyond the capabilities of the very experienced panel that YNZ appointed in this case to rapidly educate itself on the technical aspects that are peculiar to kite foiling and become effective selectors in the sport. The composition of the selection panel in this case does not provide any ground on which the nomination decision could be set aside.

39. On the issue of keeping minutes and providing written reasons, the appellant cited the "Guidance Notes on Selection" (Guidance) document published by High Performance Sport New Zealand, NZOC and Paralympics New Zealand to assist sports organisations in making their selection decisions. The Tribunal notes that the Guidance is not a binding document, and that, while it contains very good advice that NSOs would do well to follow (including as to the keeping of minutes of selectors' meetings), it does not on its own establish standards the breach of which would require a finding of failure by the NSO to follow or implement its nomination or selection criteria.

40. The appellant relied on the cases of *Roy v Canoe Racing New Zealand*<sup>4</sup>, and *Christie v Cycling New Zealand*<sup>5</sup>, to support the submission that the failure to keep minutes and give reasons meant that the Criteria were not properly followed and/or implemented. Reading the paragraphs from those cases on which the appellant relied in the broader context of the entire decisions, the Tribunal does not find that either case assists the appellant.
41. In *Roy*, the relevant selection policy, and the Terms of Reference which were to be read with it, expressly specified that minutes were to be kept and that reports were to be made to the CEO (including what those reports should contain) – see paragraphs [18]-[19] of the decision. So, in that case the NSO's failure was not so much that minutes were not kept in breach of any general obligation to do so, but a failure to follow its own procedures that expressly required that minutes were to be kept. That is not the case here.
42. In *Christie*, the Tribunal commented that record-keeping and the communication process could have been better, but that that did not mean the selectors were wrong in the decision-making. The appeal did not succeed, and the lack of adequate record keeping was not treated as a failure to follow or implement the relevant policy.
43. The Tribunal's view is that there is no basis on which it can conclude that the failure to keep minutes, or to give reasons for their decision, led to the Criteria not being properly followed or implemented.
44. Nor is there any basis for the submission that the selectors did not take reasonably available steps to follow the appellant's events (including by travelling internationally to watch those events). First, the appellant had been based in Europe for a significant part of the period leading up to the non-nomination decision, and the cost of having New Zealand-based selectors travel internationally to attend regattas in which the appellant was competing may well have been prohibitive for YNZ. In the Tribunal's view, it was an operational matter for YNZ how it deployed its selection resources, and there is insufficient evidence to conclude that a failure to send New Zealand-based selectors overseas to view the appellant's regattas in person constituted a failure to follow or implement the Criteria. The Tribunal notes further on this point that, in the *Winther and Kosinska* decision referred to by the appellant, the selectors had not personally observed any of the regattas in which either sailor had competed. On the

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<sup>4</sup> ST05/15 at [27]

<sup>5</sup> ST02/18 at [22]

facts in that case, the Tribunal appears to have accepted that the selectors had sufficient knowledge through their network to make informed nomination decisions.

45. It may be that there was opportunity for one of the selectors, who was then living in Spain, to attend one of the appellant's regattas, which was held some three hours' drive from where the selector was then living. But it is not clear what if anything additional would have been learned if this selector had attended this one regatta. That is because the selectors did receive detailed written feedback from either the appellant or his coach, including a long, detailed report dated 24 March 2024. The appellant's communications were generally provided to Mr. Woolley, YNZ's Talent Development manager, and his evidence was that he passed the reports he received on to the selectors. Considering Mr. Beck's evidence, and the evidence of Mr. Woolley, the Tribunal is satisfied that the selectors followed the appellant's results and progress closely, and that they were up-to-date with his situation (including on such matters as the perceived reasons for the appellant's results, details of the extent to which his knee injury and later illness were considered to have impacted his results, the strategies for increased success the appellant was working on, and the progress he was considered to be making) when they made their decision not to nominate him
46. On the question of whether the appellant was provided with sufficient information on what he would be judged by, and given a reasonable opportunity to provide feedback, the appellant relied on the following passage from the Tribunal's decision in *Winther and Kosinska*<sup>6</sup>:

*While the selection policy is drafted to give huge discretion to YNZ, this does not obviate its basic obligations to abide the rules of natural justice and to ensure basic fairness in its implementation. In particular, athletes in contention for nomination should be aware of what information they are being judged by and be given reasonable opportunity to provide feedback on this.*

47. The Tribunal notes first that one of the grounds of appeal in the *Winther and Kosinska* case was that "YNZ failed to provide both Ms Winther and Ms Kosinska with a reasonable opportunity to satisfy the eligibility criteria.....". The appellant had the opportunity to plead the equivalent appeal ground here, but he did not. The only appeal ground relied upon is that the Criteria were not properly followed or implemented. A second point is that, although the Tribunal in *Winther and Kosinska* expressed doubt that the athletes had been given the reasonable opportunity

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<sup>6</sup> *Winther and Kosinska v Yachting New Zealand*, above note 2, at [20].

referred to in paragraph 20 quoted above, Ms Winther and Ms Kosinska did not prevail in the case – their appeals were dismissed.

48. On the facts, it is difficult to see that the Criteria did not give the appellant sufficient information to see where he stood on the hard data, comprising regatta results and how his results compared with the top international kite foilers who would make up the fleet at the Paris Olympics. And as far as the more subjective criteria were concerned, the appellant appears to have either accepted that the level of information provided in the Criteria would be sufficient, or had ample opportunity to discuss where he stood with YNZ's High Performance team, including Mr. Woolley. In his evidence, Mr Woolley said that on 1 December 2022 he emailed all of the New Zealand sailors who were going to compete in the Sail Sydney regatta, to tell them that securing a nation spot for New Zealand at the regatta would not automatically mean that nomination and selection for the Paris Olympics would follow. Mr. Woolley expressly advised the athletes that nomination for the Paris Games would be determined in accordance with the Criteria. Mr. Woolley said that the appellant responded to this email on the same day, confirming that he had read it and understood it. Thereafter, there appears to have been ongoing communication between Mr. Woolley and the appellant or his coach, mostly by WhatsApp, and the appellant appears to have had ample opportunity to seek any explanations he may have required about where he stood and what he would need to achieve to be in the frame for nomination for the Paris Olympics,
49. The Tribunal's overall impression of the evidence of Mr. Stewart and Mr. Woolley is that the YNZ High Performance team wanted to give the appellant every opportunity to improve his results, so that he would have the best chance of qualifying for the Paris Olympics. YNZ had invested time and resources in the appellant, and it is hard to see why they would want to keep him in the dark about what he would need to do to achieve his goals.
50. The appellant and/or his coach provided detailed reports and feedback to Mr Woolley, and that feedback was duly passed on to the selectors.
51. In the circumstances just described, the argument based on the passage from *Winther and Kosinska* quoted must fail – YNZ did not fail to follow or implement any express provision of the Criteria that was relevant to this issue, and The appellant was in regular contact with Mr. Woolley. If there was any general information he needed about what would be required to meet the selection standards, he had every opportunity to ask for it .

#### Weighting given to the Selection Regattas

52. The appellant submitted that the clause in the Criteria relating to weighting (clause 11.1(b)) had the effect that the selectors were precluded from taking into account the quality of the field at the second Selection Regatta, even on the clause 4.2 issues of

“emerging talent”, “capability” of securing a top 16 placing at Paris, and the “potential” to win a medal at the 2028 Olympics in Los Angeles.

53. For YNZ, Mr. Rooney submitted that clause 11.1 (b) should be read as a qualification of, or at least in the context of, clause 11.1 (a), which is concerned with wholly objective data in the form of athletes’ actual results in competition. He further submitted that it would not make sense for the selectors to be precluded from having regard to the strength of the field in a Selection Regatta in the course of their consideration of more subjective issues, such as the clause 4.2 issues. In that context, the selectors must be entitled to consider the strength of the fields in particular events in which a sailor has competed, and there is no sensible reason why Selection Regattas should be excluded from that consideration. Clause 11.2 (d) – any other factor the selectors may consider relevant – permits consideration of the strength of the field in all regattas in which an athlete has had some success.
54. The Tribunal prefers YNZ’s interpretation on this issue. It is difficult to see how the concept of weighting an event in advance for selection purposes could have been intended to preclude consideration of the strength of the field in a Selection Regatta, for the purpose of assisting decision-making on the more subjective considerations that are required under clause 4.2.
55. A further consideration is that the application of clause 11.1(b) is qualified by the words: ‘For this factor to apply’. Those words, and the text of clause 11.1(b) that follows, suggest that the “weighting” factor was to apply only if the selectors and the sailors had all agreed, at the meeting convened under clause 10.1 (which in this case occurred in December 2022) that one or more of the Selection Regattas was to have a *higher* ranking than the others. There was no such agreement in this case, and it appears that the intention may have been that, absent such an agreement, the selectors were entitled to pass over clause 11.1 (b) as a factor in their deliberations. On that basis, there would have been no positive obligation on the selectors to refrain from considering the respective strengths of the fields in the Selection Regattas, just as they were entitled to consider the sailing conditions at a given Selection Regatta to see if they did or did not approximate to what was likely to be encountered in Marseilles at the Olympics (clause 11.2 (a)).
56. For the foregoing reasons, the Tribunal considers that there was nothing in clause 11 that precluded the selectors from taking into account, in their deliberations on the

application or otherwise of clause 4.2, the strength of the field who competed in the second Selection regatta.

Alleged errors of fact in the selectors' analysis of the second Selection Regatta, and in their consideration of the appellant's knee injury and illness

57. In the appellant's statement of evidence in reply, he pointed out that there were errors in the evidence provided to the Tribunal by YNZ relating to which athletes were absent from the second Selection Regatta. He contended that those errors resulted in the selectors wrongly taking the view that there was a "depleted field" at the second Selection Regatta, and that the reduced quality of the field was a relevant consideration on such matters as the appellant's capability of achieving a top 16 finish at the Paris Olympics, and his potential to win a medal at the Los Angeles Games in 2028.
58. In his statement of evidence, Mr. Beck had said that the YNZ selection panel took the view that the field in the second Selection Regatta was depleted because six athletes who had placed within the top 10 at the first Selection Regatta (including Alex Mazella of France, Huang Qibin of China, and Denis Taradin of Cyprus) did not compete in the second Selection Regatta.
59. In his evidence in reply, the appellant pointed out that Denis Taradin *did* compete in the second Selection Regatta, and that while Alex Mazella of France did not compete, other French athletes did compete and beat the appellant. As only one athlete from France would be able to compete in the Paris Olympics<sup>7</sup>, the absence of Alex Mazella from the field at the second Selection Regatta did not affect the appellant's result by country. The appellant accepted that Mr. Qibin did not compete at the second Selection Regatta, but said that he was capable of beating Mr. Qibin (and had done so at the French Olympic Regatta, an event that appears to have been held after the selectors had made their decision not to nominate the appellant). The appellant contended that the selectors should have approached their consideration of the strength of the field in the second Selection Regatta on the basis that, for Olympic selection purposes, only three of the top 10 sailors from the first Selection Regatta should have been regarded as missing.

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<sup>7</sup> The Men's kite foil fleet at the Paris Olympics will be limited to a total of 20 sailors, with a single representative from each qualified country.



60. The appellant also referred to an apparent error made by Mr. Woolley in an email he sent to the selectors, in which Mr. Woolley said there was no sailor from Croatia in the field at the second Selection Regatta. In fact, there was, and the Croatian sailor achieved a sixth placing in the event.
61. At the hearing, the selector, Mr. Beck, corrected his evidence to acknowledge that Denis Taradin did compete in the second Selection Regatta. And in his evidence, Mr. Woolley accepted that the appellant was correct in his statement that the absence of Alex Mazella from the field in the second Selection Regatta did not affect the appellant's (12<sup>th</sup>) placing by country. The effect of these acknowledgments by YNZ is that it is clear that some errors of fact were made in the selectors' consideration of the field in the second Selection Regatta, and that, to that extent, the selectors' decision not to nominate the appellant was based on incorrect information.
62. The Tribunal considers that the acknowledged reliance by the selectors on at least partially incorrect information about the field at the second Selection Regatta is potentially significant. The quality of the field in the second Selection Regatta was a factor the selectors were entitled to take into account and did take into account in their consideration of whether the appellant met the criteria specified in clause 4.2, and the Tribunal notes that the appellant did achieve a 17<sup>th</sup> placing in the second Selection Regatta. The extent to which the reliance on incorrect information may have affected the selectors' conclusion on the clause 4.2 issue of whether the appellant had the capability to secure a top 16 placing at the Paris Olympics, is not clear.
63. In those circumstances, the Tribunal concludes that it would be unsafe to assume that considering incorrect information on the strength of the field in the second Selection Regatta did not lead the selectors to make the wrong decision on whether the appellant met the criteria of clause 4.2. The appeal must therefore succeed on that point, with the nomination decision to be referred back to YNZ for determination using the correct facts in relation to the quality of the field at the second Selection Regatta.
64. There is no evidence that the selectors gave insufficient consideration to the appellant's medical issues, including his ongoing issues following earlier knee surgery, which were said to have impacted his performance in the first Selection Regatta, and the illness which he said affected his preparation for the third Selection Regatta. These issues were referred to in the reports sent to Mr. Woolley and passed on to the selectors and the knee injury was discussed at meeting of YNZOC and the High Performance Committee in February 2023. Mr. Beck confirmed that the selectors were aware of the injury and the illness and took them into account.

The selectors' and/or YNZOC's alleged misunderstanding as to their ability to make a recommendation or nomination subject to conditions, or to add an additional Selection Regatta

65. The appellant submitted that YNZOC did not appreciate it had the ability to either nominate an additional Selection Regatta for the appellant to attend or that it could decide to nominate the appellant with conditions.
66. This submission can be answered quite shortly. YNZ did appreciate that it had the ability to do those things, if the circumstances warranted such action. In the event, neither the selectors nor YNZOC saw any need to take either step. It appears that Mr. Beck and his fellow selectors did not see the decision not to nominate the appellant as a close call – the appellant appears to have been viewed as an athlete who had not progressed in his results since he began sailing in international events as a professional in 2019. He had not made the “Gold fleet” (top 25) in any major international regatta, and his placings in 2023 – 2024 were seen as not being significantly better than his 2019 results. The selectors did not view him as an “emerging talent” (which Mr. Beck took to mean “an athlete who, upon entry to an Olympic event, has shown quick progression through the ranks, and has demonstrated an ability to produce strong results, such as winning individual races in a world class event, or gaining a podium place on occasion.”).
67. There may be one aspect in which Mr. Beck misunderstood the scope of a conditional nomination – it appeared from his evidence that he believed that it required that the athlete must have established extenuating circumstances to qualify for a conditional nomination. But if Mr. Beck was labouring under that misapprehension, it would have had no effect on his decision on the nomination question, as neither he nor YNZOC appear to have seen any need to turn their minds to the possibility of a conditional nomination or an additional Selection Regatta.
68. The non-nomination recommendation was sent back to the selectors to review because YNZOC was not certain the selectors were in agreement. When the same recommendation came back as a unanimous recommendation, YNZOC was satisfied that an additional event or conditions were not required.
69. In the circumstances just described, there could be no finding of the selectors having failed to follow or implement the Criteria on the basis of these alleged

misunderstandings. They were not required to consider issues that they reasonably considered did not arise.

Alleged failure by the selectors to afford the appellant equal treatment with other athletes seeking nomination by YNZOC for the Olympics

70. The appellant submitted that different selection criteria were applied to other athletes, and he referred to several examples in support of this submission.
71. YNZ denies that any special consideration was inappropriately given to other sailors.
72. The problem with the appellant's submission is that his entitlement was not to receive the same favourable treatment in selection (being treatment not permitted under the Criteria) that athletes in other sailing disciplines may have (wrongly) received. His entitlement was to have the selectors and YNZOC properly follow and implement the Criteria when they considered his case. If other athletes were given special consideration going beyond what was permissible under the Criteria, it could not be an answer for the appellant to say that he should have (wrongfully) received the same special consideration.<sup>8</sup>
73. A further point is that the Tribunal did not hear from the other athletes named by the appellant. They were not parties to the proceeding, and they were not called to give evidence. In circumstances such as that, the Tribunal would normally be very hesitant to embark on a collateral enquiry into what may have occurred in their cases.
74. The Tribunal is of the view that the appellant *did* have his case properly considered under the Criteria, except to the extent that errors of fact in the selectors' analysis of the field in the second Selection Regatta may have affected the analysis the selectors were required to undertake under clause 4.2 of the Criteria. Any (unjustified) favourable treatment that may have been given to other sailors seeking nomination for the Olympics does not affect that conclusion.

Did the YNZOC abdicate its role as decision-maker to the selectors?

75. The Tribunal does not believe that it did.

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<sup>8</sup> The statement of the Tribunal in the *Winther and Kosinska* case at [10] that "I reject the submission that because of a questionable approach by YNZ at that time, the sailors should be given a compensatory benefit now", illustrates the same point in a slightly different context.

76. In his evidence, Mr. Clinton explained his view that the role of YNZOC was essentially a review role, with its powers being limited to either accepting the selectors' recommendation or sending the recommendation back to the selectors for reconsideration.
77. The appellant argued that YNZOC failed to appreciate that it had the right under the Criteria to override the selectors' non-nomination recommendation, and simply nominate the affected athlete to NZOC for selection.
78. Mr. Clinton did not accept that the YNZOC had that power, saying that if the situation ever arose where YNZOC considered that the selectors had wrongly refused to recommend an athlete for nomination, and refused to change their recommendation following a direction from YNZOC to reconsider, the likely course would be for YNZOC to refer the issue to the board of YNZ for further advice.
79. On reading the relevant provisions of the Criteria, it is not clear to the Tribunal that YNZOC *did* have the power to override a selectors' non-nomination recommendation. But in the end, it is not necessary to decide the point. That is because the Tribunal is satisfied that there were no facts or circumstances before YNZOC that should have caused it to consider overriding the selectors and nominating the appellant, even if it did have the power to do so.
80. YNZOC reviewed the selectors' recommendation as it was required to do under clause 7.2 and 5.1(b) of the Criteria, and it did initially refer the nomination issue back to the selectors for reconsideration. When the selectors came back to it confirming their initial recommendation, YNZOC accepted the reconsidered recommendation.
81. In circumstances where there were no known facts or circumstances that might have called for YNZOC to consider overriding the selectors' recommendation, it could not have been a failure to follow or implement the Criteria when YNZOC did not do so.

What is the effect of two of the selectors being present at the 10 April 2024 meeting of YNZOC?

82. In the Tribunal's view, there was nothing in the attendance of the two selectors that would warrant any finding of a breach of natural justice. Both selectors were also members of YNZOC, and there was nothing untoward in them attending the meeting

to speak to their recommendation and to address any other YNZOC business. Their presence gave YNZOC the ability to ask for any further information it wanted, or to challenge the recommendation made. Neither selector participated in YNZOC's vote on the recommendation, which was a vote to ask the selectors to reconsider, and there is no evidence that the selectors were actively involved in the discussion immediately prior to the vote.

83. The Tribunal accepts that best practice may have been for the selectors to have left the meeting room immediately after they had spoken to their recommendation and answered any questions, but there is no evidence of any impropriety on their part that could potentially have affected the validity of YNZOC's decision.

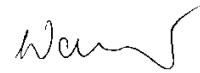
Would the appellant have satisfied clause 4.2 if the selectors had applied the ordinary, dictionary, meanings of "emerging", "capability", and "potential" as those expressions are used in clause 4.2?

84. Subject only to the need for YNZ to reconsider the errors in its consideration of the field who competed in the second Selection Regatta, there is no basis on which the Tribunal could reasonably substitute its own views on the merits for those reached by the selectors.
85. The Tribunal is unable to say that the selectors adopted meanings of the above expressions that were not reasonably open to them, and they were entitled to use their substantial expertise and knowledge of international world sailing events, including Olympic Games experience, in applying the clause 4.2 criteria. The matter of assessing such things as a sailor's "capabilities", or "potential", are quintessentially issues for the sailing experts, and not for a body such as the Tribunal, who has no such expertise. The Tribunal is concerned with whether selection procedures have been properly followed and implemented – it is not its role to form its own separate view of the merits of the decisions made by the selectors once it is satisfied that the proper procedures have been followed and implemented.
86. Accordingly, and subject to the qualification relating to the requirement that YNZ reconsider its conclusions on the field who competed in the second Selection Regatta, the issue raised by the appellant under this heading cannot provide any basis on which the appeal could have succeeded.

The party to whom the non-nomination decision should be referred back.

87. This was an issue raised by Mr. McCartney at the end of the hearing. He submitted that the Tribunal should direct that any reconsideration should be by YNZOC, and not by the selectors.
88. In the Tribunal's view, that was not a course that was open to it. Rule 49 (a) provides only for referral of the selection question back to the NSO, which in this case is YNZ.

Dated: 2 June 2024



**Warwick Smith**  
**Acting Chair**



**Ruth Aitken DNZM**



**Pippa Hayward**