
CAS 2012/A/2837 Appeal by Ms Hayley Beresford v Equestrian Australia

FINAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: The Hon Jerrold Cripps QC

CAS Clerks: Ms Niamh Mooney and Ms Sarah Longes

between

Hayley Beresford, Sydney, Australia

represented by Elisa Holmes, Sydney, Australia

instructed by Chris Ellison, Perth, Australia

- Appellant -

and

Equestrian Australia, Sydney, Australia

represented by Dominic Villa, Sydney, Australia

instructed by Garth Towan, Lander and Rogers, Melbourne, Australia

- Respondent -

The Appeal

1. This is an appeal against the decision of the Equestrian Australia Appeal Tribunal published on 22 June 2012 dismissing an appeal by Hayley Beresford.
2. The appeal is to the Appeals Division of the Court of Arbitration of Sport and, pursuant to Rule 50 of the Rules, is to be heard by a sole arbitrator.
3. Before the Appeals Tribunal and this appeal to CAS the grounds of appeal were expressed to be against decision(s) not to nominate Hayley Beresford for the London team. The question of law in this appeal became not whether Hayley Beresford was wrongly excluded from the team but whether Kirsty Oatley was wrongfully included.
4. Kirsty Oatley is an interested party to this appeal and was represented by Mr Curtin. The Australian Olympic Committee was an interested party represented by Fiona DeJong who was present throughout the hearing.
5. Hayley Beresford's appeal from the Selection Panel was, in accordance with the Olympic Team Selection By-Law pursuant to the Australian Olympic Committee Rules was, by 11.5 limited to four grounds of appeal, namely:
 - (i) the applicable Nomination Criteria have not been properly followed and/or implemented;
 - (ii) the appellant was not afforded the reasonable opportunity by the NF to satisfy the applicable Nomination Criteria;
 - (iii) the nomination decision was affected by actual bias; or
 - (iv) there was no material on which the nomination decision could reasonably be based.
6. The appeal to CAS from the Appeals Tribunal was limited by clause 11.10 of the by-laws and was confined to:
 - (i) that there was a breach of the rules of natural justice by the Appeals Tribunal; or
 - (ii) that the decision of the Appeals Tribunal was an error on a question of law.
7. The question of law, as has been earlier mentioned, was expressed by Hayley Beresford to be the failure of the Selection Panel and later the Appeals Tribunal to nominate her for the London Olympic Games Equestrian Dressage Team.
8. But whether the appeal be expressed to be against Hayley Beresford's exclusion or against Kirsty Oatley's inclusion, the question of law remains the same that *vis* on a proper construction of the relevant rules, Kirsty Oatley was not eligible for Discretionary Nomination to the Equestrian Team because she had not, as at 5 March 2012, been chosen for the Short List in accordance with Part A clause 3 of the Equestrian Australia Nomination Criteria.
9. Hayley Beresford was on the Short List as at 5 March 2012. Kirsty Oatley was not but had been added on 27 April 2012.
10. It was contended by Hayley Beresford that a mandatory requirement for selection was that the rider (and horse) had to have been included in the Short List as at 5 March 2012. Kirsty Oatley was not, as has been mentioned earlier, on the Short List on 5 March 2012

and for that reason, it is submitted by Hayley Beresford, she was precluded from being selected for the London Olympics.

11. Contrary to the submission by Ms Holmes on behalf of Hayley Beresford it was by no means clear that if Kirsty Oatley were to be excluded Hayley Beresford must have been included.
12. Although the Rules make provision for selection by the CAS and to substitute Hayley Beresford for Kirsty Oatley should her appeal before CAS be upheld, CAS, although giving notice that it was a possibility, would not have made the selection because it was satisfied that Equestrian Australia would have been able to do so. In the events that transpired the matter became academic because the appeal was to be dismissed.
13. Eligibility for nomination for the Australian Equestrian Team is regulated by the Nomination Criteria.

Part A - DRESSAGE:

2

- (a) The objective of these Nomination Criteria is to nominate horse and Athlete combinations that the Dressage Selection Panel believes will achieve the best possible result at the 2012 Olympic Games. The term "best possible result" covers both an individual and a team result and is based on the expectation that a team can finish in the top eight (8) places or two individual Athletes in the top thirty-two (32) individual classification places at the 2012 Olympic Games.
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) The Dressage Nomination of this horse and Athlete combinations the opportunity to be nominated to the Australian Olympic Team in three ways as set out in clause 4 below. These are:
 - (i) Early Nomination.
 - (ii) Automatic Nomination.
 - (iii) Discretionary Nomination.

3 Criteria for Nomination Events Short List

A Short List of up to eight (8) horse and Athlete combination will be chosen by the Dressage Selective Panel on or before 5 March 2012 to compete in the two Nomination Events as required for Automatic or Discretionary Nomination to the AOC. In determining the Short List, the Dressage Selection Panel will take into consideration:

- (a) the performance of horse and Athlete combination based on results from the Grand Prix Test at CDI and CDI-W events in Australia, Europe and the US between

1 January and 5 March 2012. In considering such results the competition based factors will be taken into consideration:

- (i) performance achieved in outdoor competitions will have priority over indoor competition;
 - (ii) the standard of competition, the number of competitors and the level and experience of judges and the overall quality of the competition;
 - (iii) the type of footing, weather conditions and arena characteristics;
 - (iv) head to head performance of horse and Athlete combination, however placings do not automatically position one horse and Athlete above another in terms of other of selection for the Short List; and
- (b) the ability of the Athlete to prepare their horse to peak conditions for a major campaign.

4(D) Discretionary Nomination

Following the Early and Automatic Nomination of horse and Athlete combinations to the AOC the Dressage Selection Panel will nominate the remainder of the Dressage Team in its discretion, based on horse and Athlete combination having achieved the following criteria.

14. The criteria include a number of Nomination Events but in subject to clause 5.
15. Clause 5 provides extenuating circumstances "for the purpose of Discretionary Nomination under clause 4(D) above the Dressage Selection Panel may, in their discretion, excuse a horse and Athlete combination from compliance with the requirements of competing in the Nomination Events as outlined in clause 2 (g) above on the basis of extenuating circumstances as defined in clause 4 of the EA Nomination Criteria.
16. It is not a ground of appeal that the applicable Nomination Criteria have not been properly followed or implemented. That is not an available ground of appeal from a decision of the Appeals Tribunal to CAS as it does not raise a question of law. Moreover the jurisdiction of CAS to review facts and law pursuant to Rule 57 of the Code of Sports Related Arbitration is limited in the first instance to determine whether or not an appellant has made out her grounds of appeal. By-Law 11.18.
17. Ms Holmes submitted a matter of irresistible implication that being a member of the Short List is a legal requirement for selection. Her submission was (as it had been before the Appeals Tribunal) that the whole point of a Short List is to limit the number of candidates eligible to go forward. But assuming that to be so ordinarily the establishment of a Short List in the course of a selection process does not, without more, preclude the selection of a candidate who is not on the Short List. Of significance in the present case is there is no stated requirement for selection that a candidate be on the Short List.
18. The dominant objective of the Nomination Criteria is to select the horse and Athlete that the Dressage Selection Panel believe will achieve the best possible result in the 2012 Olympic Games. Nowhere is it stated that non-inclusion in the Short List precludes a candidate for selection.

19. Before the Appeals Tribunal evidence was given by Ms Fowler that the "Short List was to assure or guarantee combinations in the Short List, places in the Nomination Events". That was because Australian riders wishing to compete in Nomination Events may find that due to the total number of event entries or other factors the organising committee of a particular event does not accept their entry. To bring some certainty to the process the National Federation negotiated with the organising committee of the Nomination Events to reserve (at least hopefully) eight places for the Australian Athletes. Other combinations could still apply for Nomination Events but would have to take their chance of being granted entry. Of significance she said "the Short List is not a Short List for eligibility for the Nomination Events; or for eligibility for Discretionary Nomination. It is a Short List for guaranteed places at the Nomination Events".
20. The Appeals Tribunal was criticised for accepting Ms Fowler's evidence because, it was submitted, it accepted her private interpretation when that was irrelevant. But Ms Fowler's evidence was directed, not to advancing her own private view as to the construction of the Nomination Criteria. It was to explain what is (and what has been in the past) the purpose and function of the Short List - Hayley Beresford was selected for Beijing without having been on the Short List.
21. CAS accepts the submission of Mr Villa that in the light of the background circumstances described by Ms Fowler the provisions of clause 3 are properly regarded as facilitative, rather than mandatory pre-conditions. And that, in CAS's opinion, is the proper contractual interpretation of the provisions of clause 3.
22. In the opinion of CAS no error of law has been demonstrated and the appeal must be dismissed.

Costs

23. Leave is granted to Mr Curtin to make a submission as to the costs. Should he wish to pursue any claim for costs against Hayley Beresford he should do so within seven (7) days of receiving these reasons.

ON THESE GROUNDS

The Court of Arbitration for Sport:

1. Dismisses the appeal filed by Ms Hayley Beresford.
2. Confirms the decision of the Equestrian Australia Appeal Tribunal published on 22 June 2012.
3. Reserves its decision as to costs.

12 July 2012

THE COURT OF ARBITRATION FOR SPORT

The Hon. Jerold **Cripps** QC

Sole Arbitrator