

BETWEEN **SCOTT MANSON**

 Appellant

AND **KARTSPORT NEW ZEALAND**

 Respondent

AND **REID HARKER**

 Interested Party

REASONS FOR DECISION GIVEN ON 13 OCTOBER 2011

Hearing: 12 October 2011, Auckland

Present: John Hamilton and Chris Manson for Appellant
 Graham McKenzie, Robert Hutton and John Lennox
 for Respondent
 Mike Harker for Interested Party (by telephone
 conference)

Tribunal: Barry Paterson QC, Chairman
 Dr Lynne Coleman
 Rob Hart

Registrar: Brent Ellis

INTRODUCTION AND BACKGROUND

- 1 This is an appeal by Scott Manson (Scott) against a decision of the Appeal Board of Kartsport New Zealand (the Appeal Board), dismissing his appeal from a decision of a Stewards' Committee.
- 2 Because the decision of this Tribunal was required urgently, a decision, without reasons, dismissing the appeal was given on 13 October 2011. The reasons are set out below.
- 3 Scott, obviously a talented young driver, competed in the Junior Class of the 2011 New Zealand ROTAX MAX Challenge. The challenge is raced at six venues during the season and competitors are awarded points according to their finishing position for both the pre-final and final at each venue. The winner of the series represents New Zealand overseas. The need to confirm New Zealand's entry for this year's event was the reason for giving the decision without reasons.
- 4 Points from the worst performance of each competitor are disregarded, but if a competitor is disqualified at an event that event can not be the competitor's worst performance when the points are tallied.
- 5 The first event of the year was held at Palmerston North on 19 February 2011. Scott did not complete the pre-final because of a spark plug failure. He started the final from the back of the grid but despite this handicap won.
- 6 Scott was subsequently disqualified for having an unmarked carburettor when racing in the final. He appealed this disqualification to the Appeal Board, which dismissed the appeal and this appeal is against that decision.
- 7 If he had succeeded in this appeal, Scott would have been the New Zealand representative overseas. As the appeal has not succeeded, Reid Harker will represent New Zealand.

- 8 The history of this matter is unusual. When Scott's kart was inspected after the final, it was found that there was no paint on the carburettor. The Chief Steward, Peter Cartwright, filed a form of complaint and Scott and his mechanic were summonsed to a Stewards' hearing. The evidence of the parties differed as to the way the Stewards disposed of the matter in the absence of Scott and his father. Their decision was to uphold the complaint and to disqualify Scott.
- 9 The disqualification was recorded on the form of complaint as being made at 11:45pm. Later that night, the Clerk of the Course instructed the Chief Technical Officer to complete a technical inspection of the engine of Scott's kart. It was completed and the engine was found to be compliant. The Chief Steward, who later complained he took this action as a result of pressure brought on him by the Clerk of the Course, cancelled the disqualification at 1:10am on 20 February 2011.
- 10 Kartsport subsequently held an inquiry into the cancellation of the disqualification. The inquiry held that the decision of the Stewards' Committee stood and confirmed the disqualification. Scott then appealed to the Appeal Board.

THE APPEAL BOARD DECISION

- 11 After recording the background of this matter, the Appeal Board decision notes that Mr John Hamilton representing Scott submitted that a number of fundamental errors were made in the manner in which the whole incident was handled. There are three mentioned in the decision, namely:
 - (a) If an official believes that a competitor has infringed a rule then that rule must be notified and the competitor given the right to defend that charge in front of an unbiased panel. Rule L8.3 does not in itself constitute a breach by the competitor.

- (b) Scott was denied a fundamental right to give evidence at the Stewards' hearing as the hearing went ahead without Scott being present. The Appeal Board noted that Scott claimed that he was waiting outside the hearing room.
 - (c) The inquiry introduced a further rule which was claimed to be breached but which did not appear on the original form of complaint.
- 12 The decision is confusing when it refers to the evidence given. It notes that witness statements were given by Mathew Hamilton and Hamish Cross who both supported evidence given by Scott in regard to the attendance at the Stewards' hearing. Scott was not at the hearing and did not give evidence. Presumably, this is a reference to submissions made by Mr John Hamilton who as the representative of Scott was not there to give evidence but to represent him.
- 13 It noted that John Lennox (representing Kartsport New Zealand) gave evidence relating to what engine markings were carried out on the day and what checking was carried out to ensure all competitors equipment was marked correctly. Presumably, this is a reference to Mr Lennox making submissions on the evidence. Mr Lennox was not in a position to give the evidence as he did not do the checking. The decision notes that Jamie Aislabie gave evidence to this effect in his role as the senior technical officer for the meeting. Presumably, "to this effect" related to the markings and checkings. A statement from Warren Riddick, the assistant technical officer, was also referred to and it was noted that he also tabled evidence supporting the process on the day. The decision notes that Jamie Aislabie also gave evidence as to Scott's non-attendance at the Stewards' hearing. Finally, the decision noted that Peter Cartwright, the Chief Steward on the day, gave evidence relating to the issue of the Form of Complaint and the sequence of events that led to the conduct of the Stewards' hearing without the competitor being present.

14 The Appeal Board found:

- (a) The carburettor was not marked when viewed at Technical Inspection following the Final race;
- (b) Evidence was presented to satisfy the Appeal Board that the carburettor should have been marked at Technical Inspection;
- (c) The Form of Complaint was filled out sufficiently not to invalidate its effect;
- (d) The Form of Complaint was served correctly;
- (e) The Stewards' hearing that went ahead without the competitor was lawful under the Rules of Kartsport New Zealand;
- (f) The penalty of disqualification was appropriate under the rule cited on the Form of Complaint.

Consequently, the appeal was unsuccessful and the disqualification stood.

THE APPELLANT'S SUBMISSIONS ON APPEAL

15 Because of indications given by the Chairman of the Tribunal in a pre-trial telephone conference, Mr Hamilton did not at the hearing before the Tribunal address all the grounds of appeal set out in the appeal brief. It is however appropriate to refer to those grounds as they have all been considered by the Tribunal.

16 The 13 grounds in the appeal brief were:

- (a) The rule quoted in the Form of Complaint (L8.3) does not impose any responsibility on the competitor to have the carburettor marked.

- (b) The Form of Complaint was not completed correctly, being unsigned, undated, etc.
- (c) The protest hearing was held in the absence of the accused. While r C4.5 allows for a hearing in the absence of the concerned party, this should only happen if the party mentioned in the Form of Complaint has been given every opportunity to and has refused to attend the hearing.
- (d) The person who filed the complaint chaired the protest hearing thereby forming half of the panel. This was in breach of the rules of natural justice.
- (e) While Kartsport is entitled to hold inquiries, it can only do so if there is a *prima facie* case to be met and then it must provide a proper and detailed Notice of Hearing (r C5.3.4). When the National President was queried as to the reason for the inquiry, he confirmed verbally that it would in no way affect the result of the meeting.
- (f) The Kartsport inquiry introduced another rule altogether and a further rule could not have been introduced at that stage.
- (g) At the Appeal Board hearing, the Kartsport representative (presumably, Mr Lennox) introduced "legal opinion" that suggested only the original protest could be considered and that the Appeal Board had no right to consider if the Inquiry Board decision was just.
- (h) At the Appeal Board hearing Mr Lennox claimed to have in his possession two letters which indicated certain matters but did not produce them because he did not have supporting evidence.
- (i) Mr Aislabie did not, in fact, do the marking of the components for the meeting in question as these were done by an unnamed teenage helper. No evidence has been

produced as to the helper's experience or credibility. Mr Riddick's claim that he checked all identification paint after the second time trial was clearly not true.

- (j) The Appeal Board decision was incorrect as to the time within which Scott was asked to appear before the Stewards' hearing.
- (k) A letter from Mr Munro supporting the fact that the carburettor could not have been changed was produced to the hearing.
- (l) It is not the competitor's responsibility to have his equipment marked for a competitor.
- (m) If the instruction was given at the drivers' briefing requiring the competitors to check that the marking had taken place, that instruction could not alter the Rules or Supplementary Rules and Specifications.

17 After the above list, Scott's position was summarised as follows:

This matter came about because the person who had been charged with technical marking after qualifying omitted, probably by accident, to mark Scott's carburettor. When the technical people noticed after the event that the paint was missing, Peter Cartwright issued a DQ. The rule quoted on the Form of Complaint doesn't cover the situation in question and when this was pointed out to him Peter "lost his cool". He was further aggravated when Scott's guardian refused to accept the DQ, insisted on a hearing and then complained upon learning that Peter himself intended to be on the panel. We have no idea why the hearing took place without calling the Appellant who was waiting outside the hearing room door but we suspect that it may have been a rather spontaneous and spiteful action.

18 It is appropriate to comment on those grounds of appeal mentioned in paragraph 16 which are not noted in the issues below (using the same identifier):

- (b) This procedural point could not have succeeded. The Form of Complaint clearly stated the substance of the complaint,

namely that there was "no carburettor seal paint present". Scott was in no way disadvantaged by the contents of the Form of Complaint. He was well aware of the reason for the Stewards' hearing.

- (c) The Tribunal can not determine where the truth lies in respect of holding the Stewards' hearing without Scott's representatives being present. Natural justice considerations entitle a person who is facing a possible disqualification to present his case. Even if the evidence of Peter Cartwright is correct, he had, in the Tribunal's view, an obligation to reconvene the hearing, when he was aware that Scott's representatives were at the hearing room. However, this ground could not have succeeded in respect of an appeal to this Tribunal because the Appeal Board heard the matter *de novo* and this appeal is from the Appeal Board's hearing and not from the hearing of the Stewards' committee.
- (d) It is a fundamental principle of natural justice that a person who makes a complaint should not be one of the persons who then determines the complaint. Kartsport claims that its rules entitle Peter Cartwright to do so. In a relevant matter, a court is likely to overturn a decision in which a complainant is also a decision-maker notwithstanding what the rules may say. However, there are two reasons why this ground could not have succeeded in this case. First, the Appeal Board heard the matter *de novo*. Secondly, while Peter Cartwright signed the Form of Complaint, he was, in fact, not the complainant. The actual complainant and the person who should have completed the Form of Complaint was Jamie Aislabie. Kartsport would be wise to give a direction that Forms of Complaint not be signed by a person who is to be a steward sitting on the hearing.
- (e) The issue of whether or not the National President misled Scott's representative as to what was to be considered at the

inquiry can not be determined on this appeal. Submissions have been made on the point but there has been no evidence led in the normal manner. The Notice of Hearing for the inquiry was on the economical side and prudence suggests that it should have been far more explicit. However, the letter to Scott's father dated 25 August 2011 did advise that the inquiry "will be reviewing Form of Complaint #407980 against Scott Manson Competitor #9 in the Rotax Max Junior Class..." Mr Manson was invited to give evidence. Good practice suggests that the notice should have referred specifically to the matters which the inquiry was required to address and any possible consequences to Scott resulting from that inquiry.

- (g) Kartsport disputes that it introduced a legal opinion. It appears as though the reference was to the appeal hearing being *de novo*. This legal term may have confused Scott's representatives but was descriptive of the correct position.
- (h) If the Kartsport representative did as alleged in the grounds of appeal, it was unfortunate and inappropriate. There is, however, no evidence apart from an allegation in the grounds of appeal and there is no suggestion in the Appeal Board decision that this was a factor in the decision. In the Tribunal's view, the real issue in this matter can be determined without being influenced by any unfortunate references.
- (i) This matter may be relevant to one of the issues referred to below but is not a ground of appeal in itself.
- (j) This matter has already been covered in (c) above.
- (k) This is not really a ground of appeal and if anything is new evidence being introduced on this appeal. However, in the Tribunal's view, it is not relevant to the fundamental issue.

THE ISSUES

- 19 It is common ground that at the end of the Final the carburettor was not marked. The issues which arise are:
- (a) does the competitor have any responsibility to ensure that the carburettor is marked?;
 - (b) if the drivers' briefing imposes a *prima facie* responsibility on the competitor to ensure that the carburettor is marked, is the imposition of that responsibility contrary to the Rules?
 - (c) what is the effect of rule P1.3 and did it apply in this case?

SCOTT'S CASE

- 20 The Form of Complaint said, in effect:

I wish to lodge a complaint against the actions of Scott Manson Kart No. 9 Class ROTAX MAX Junior Final Event Kart in Dark Venue Manawatu.
The substance of the complaint being (give details including Rule number/s
No carburettor seal paint present Rule L8.3.
Suggested resolution of disqualification from event.

As already stated, the Tribunal is of the view that Scott was given sufficient notification of the allegation against him.

- 21 The relevant portion of Rule L8.3 reads:

MOTOR EXAMINATION: Engines and auxiliary parts will be sealed as required by the Technical Officer at each event... The minimum penalty for any infringement found during motor examination will result in a disqualification from the respective class.

The submission on behalf of Scott is that the important phrase is "as required by the Technical Officer". At different meetings different items of equipment are required to be marked or

sealed. It was submitted that the competitor is not privy to what the technical people intend to mark or seal.

- 22 The rule which Mr Hamilton says was referred to for the first time in the inquiry was Rule P1.3. The relevant portion reads:

Competitors' tyres, chassis and engine(s)/carburettor(s)/exhaust(s)/ etc. will be marked at the end of the first Time Trial contested.

- 23 Scott's position is that this rule says when the items are to be marked but does not place any responsibility upon the competitor. If, as Kartsport contends, it is the driver's responsibility to ensure that the marking takes place, neither r P1.3 nor any other rule places that responsibility on the driver.

- 24 Further, it was submitted that if it is the driver's responsibility then the Technical Officer should mark all items referred to in r P1.3 at every meeting. This is not done and rarely are chassis marked. While there was no evidence on the non-marking of the chassis, it is noted that this matter was, in effect, conceded by Kartsport in its submissions.

- 25 Mr Hamilton accepted that it was reasonable for drivers to follow the decisions and rulings of the Chief Steward but this can only apply to rulings which do not contravene the Rules or Supplementary Regulations of the contest. It was accepted that "all competitors were told at drivers briefing that engines, carbs, tyres, etc. would be marked after the first Time Trial and it was their responsibility to ensure all markings were present." The point taken is that this instruction that it was the driver's responsibility to ensure all markings were present was contrary to the Rules and Regulations under which the contest was staged.

- 26 In support of the previous submissions, Mr Hamilton referred to r B15.1 which provides that the Rules and Specifications may not be varied except with written approval of the National Steward

and/or the National Technical Officer through Supplementary Rules and Specifications. Because of r B15.1, it was submitted that the drivers' briefing in this case contravened this rule by:

- (a) changing the equipment that was to be marked to no longer include chassis; and
- (b) by attempting to make marking the competitors' responsibility.

27 It was submitted that a farcical situation would arise if the drivers were only responsible for matters referred to in the briefing. This is because a competitor is never privy to what a Technical Officer is going to mark and it can therefore not be the driver's responsibility.

28 Mr Hamilton summarised the position as follows:

At the meeting in question, a minor, had his equipment marked after the first Time Trial by a, to date, unnamed and apparently unqualified "Teenage helper" in an area that was restricted to his guardian/father. Scott asked "Has everything been marked?" to which the marker responded "Yes". Scott left the uncontrolled area with no reason to believe anything other than all parts "as required by the Technical Officer" had been marked.

He further submitted that in this junior class the competitors are only children and should not be responsible for such matters.

29 A final submission on behalf of Scott was that there was no discussion of Rule L8.3 at the Appeal Board hearing.

KARTSPORT'S POSITION

30 It is not proposed to set out in detail the issues raised in Kartsport's Statement of Defence. In summary:

- (a) Scott and his father, Chris Manson, signed an entry form declaring they were conversant with and would abide by all Kartsport's Rules and Event Supplementary Rules and follow the directions of officials.

- (b) All competitors and, in this case, their guardians, were required to attend a drivers' briefing where the Chief Technical Officer briefed everyone that marking would be done after the first time trial and it was the drivers' responsibility to ensure all items were marked.
- (c) The engines, carburettors, pipes and tyres of the Rotax Junior karts were marked after the first time trial and checked and confirmed after the second time trial.
- (d) Upon checking the Appellant's kart after the Final race it was found to have an unmarked carburettor.
- (e) As it was the driver's responsibility to check that all markings had been completed, and Scott had driven a car with an unmarked carburettor the Rules must be followed and Rule L8.3 required that Scott be disqualified.

DISCUSSION

- 31 There are several possible reasons for the carburettor not being marked after the Final. This Tribunal is unable on the information before it to determine the reason. It acknowledges that the decision it was required to give dismissing the appeal may have meant that Scott was denied the right to represent New Zealand overseas when his only omission may have been a failure to check that his carburettor was marked.
- 32 Rule L8.3 is clear. An unmarked carburettor leads to a minimum penalty of disqualification. The Tribunal accepts that this may not be the result if it can be established, on the balance of probabilities, that the failure to mark was the fault of Kartsport, and there is no obligation on the competitor to check that the markings are in place.

- 33 Rule L8.3 states that the engine and auxiliary parts will be sealed as requested by the Technical Officer. It does not place any responsibility on the competitor but it also does not absolve the competitor of responsibility if such responsibility is otherwise imposed on him.
- 34 Attendance at drivers' briefings by both the driver and in the case of someone of Scott's age, his guardian, is mandatory (r G1.2). This rule acknowledges that drivers' briefings are an important part of a race meeting. It is not disputed that at this particular briefing the competitors and their guardians were advised that it was the driver's responsibility to ensure that all markings were present. The Tribunal sees no reason why a responsibility can not be imposed upon a driver, at a drivers' briefing, if that responsibility is not in conflict with any rule.
- 35 In the Tribunal's view, r L8.3, while clearly implying that the Technical Officer will mark the carburettor, does not preclude a responsibility being placed on the driver to check that the carburettor has been marked. That responsibility is not in conflict with the provisions of r L8.3. Both Scott and his father signed the registration form which declared that they would abide by the directions and rulings of the Chief Steward on the day without losing any right to protest or appeal. One of those rulings was that the competitor should check that the appropriate marking was on the carburettor and, in the Tribunal's view, this direction can not be challenged as it was not inconsistent with Kartsport's Rules and Regulations.
- 36 The wording of the Appeal Board decision is in some respects unfortunate. It found that the carburettor "should" have been marked at the time of the technical inspection. This term is ambiguous as to whether it found it was marked, or should have been marked, although the latter may be the more appropriate inference from the term. Further, the references in the Appeal

Board decision to the evidence of Messrs Aislabie and Riddick also is not as explicit as it could have been.

- 37 Jamie Aislabie's evidence was that the engines and ancillaries were marked at the end of the first Time Trial in the same manner as they have done for many years. However, it appears as though he did not himself do the markings, nor did he check them. His evidence could therefore only be second hand.
- 38 Warren Riddick, the Assistant Technical Officer, whose evidence was that the "meeting was the same as all the others, all Tyres, Engines and Carburettors are marked after the First Time Trial then Rechecked after the Second Time Trial to make sure all items were marked/painted. The weather was fine so we had no problems with paint marking staying on the engines." This written evidence is not specific as to whether Warren Riddick himself ensured that the markings were correctly applied or that he rechecked them.
- 39 The Appeal Board questioned both Jamie Aislabie and Warren Riddick in the hearing and they were cross-examined. In the absence of any evidence to the contrary, and in the unfortunate absence of any notes of the cross-examination, this Tribunal must assume that the Appeal Board was of the view that the markings had been carried out.
- 40 The Tribunal concluded that while it is for Kartsport's Technical Officer to mark, it was also the driver's responsibility to ensure that the markings were there. If they were not there, the effect of r L8.3, harsh although it may be, is that disqualification follows. In the case of a junior such as Scott, it is for the parent or guardian to ensure that the marking was present. They were told so at the mandatory briefing. John Hamilton for Scott accepted that carburettors are always marked.

- 41 In the unfortunate circumstances of this case, the Tribunal concluded, as the carburettor was not marked for whatever reason, disqualification followed.
- 42 The fact that chassis were not marked did not assist Scott. The evidence is that chassis were not mentioned in the drivers briefing and Kartsport's position is that they are often not marked because the driver only brings one chassis to a meeting but may bring two engines and two carburettors. The fact that r P1.3 may not have been followed in respect of chassis does not assist in respect of carburettors where there was a direct reference at the drivers' briefing.
- 43 The Tribunal can not form a view on the significance which the Appeal Board gave to r L8.3 as there was insufficient evidence on that point. It notes, however, that there are two references in the Appeal Board hearing to r L8.3 and it noted the submission made by John Hamilton in respect of that rule. The Tribunal can therefore not conclude that the Appeal Board did not have in mind the provisions of r L8.3.

OBSERVATIONS

- 44 The Tribunal accepts that in sports such as Kartsport, it is necessary to rely upon volunteers, both at the meeting and also for administrative functions, including appeal boards. The comments which it makes are not intended to be critical of these volunteers but are made in the hope that they may assist Kartsport.
- 45 The Tribunal makes the following observations:
- (a) If, as suggested, chassis are not always marked, then r P1.3 should be amended;

- (b) Confusion would be avoided if the Rules clearly stated that where parts are to be marked the driver has a responsibility to ensure that they are marked;
- (c) Although Kartsport takes the view that the Rules allow a Chief Steward to both lay a complaint and then determine the complaint, Kartsport should resist the possibility of having a court overrule such a decision on the grounds of natural justice by ensuring that the Chief Steward does not lay the complaint. The complaint in this case should have been laid by Mr Aislabie.
- (d) An appeal board, where it may be subject to a further appeal, should always keep notes of the cross-examination. A body runs the risk of an appeal decision properly made being overturned if the decision rests on evidence which came out in cross-examination and that cross-examination is not recorded.
- (e) The matters before the Appeal Board were overlaid by legal issues. It appears, from what the Tribunal was told, that the Appeal Board were very experienced members of the sport. However, in the Tribunal's view, the Appeal Board should have included a member with an understanding of the legal principles involved, including those of natural justice, and the matters which need to be included in a decision.
- (f) The Notice of the inquiry should have been more explicit. It is noted that the report of the inquiry included a reference to the Terms of Reference. It referred to "Review all aspects related to Form of Complaint". The Notice to Chris Manson did not include the words "all aspects". If it had included those words, he may have been alerted to the matters to be considered.

Dated 27 October 2011

A handwritten signature in blue ink, appearing to read 'B J Paterson', is positioned above a dotted line.

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B J Paterson QC
Chairman