

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA
(CRDSC)**

NO: SDRCC 20-0481

BETWEEN:

KATIE WEAVER

CLAIMANT

AND

NORDIQ CANADA

RESPONDENT

AND

LAURA LECLAIR

AFFECTED PARTY

DECISION

Appearances:

Jim Smellie

Counsel for the Claimant

Adam Klevinas

Counsel for the Respondent

Kate Boyd

High Performance Director, Nordiq Canada

Maurice Samm

Representative for the Affected Party

1. On December 28, 2020, I was selected by the parties as a Resolution Facilitator to resolve a dispute between Katie Weaver and Nordiq Canada regarding her non-selection to the 2021 Competition Team for World Cup Period 3 (the “Team”).
2. The Team was scheduled to depart Canada on or about January 13, 2021. Although the dispute was commenced as a resolution facilitation process only, because time was of the essence, the parties agreed to waive the requirement to exhaust Nordiq Canada’s internal appeal process and resolve the dispute by way of a mediation-arbitration process directly through SDRCC. (Articles 3 and 4 of *Canadian Sport Dispute Resolution Code* (the “Code”)).¹
3. The December 28, 2020 mediation was unsuccessful in resolving this dispute. Ms. Weaver and the Respondent filed simultaneous submissions on January 5, 2021, followed by submissions by the Affected Party later that same day.
4. On January 6, 2021, I issued my decision to deny Ms. Weaver’s appeal, with reasons to follow. These are my reasons.

BACKGROUND

5. Nordiq Canada (“NC”), a not-for-profit organization, is the national governing body for cross-country and para-nordic skiing in Canada. The Federation Internationale de Ski (“FIS”) is the international governing body for establishing international competition rules.
6. On October 15, 2020, NC published Competition Trip Criteria – Selection Criteria 2020-21 (the “Criteria”), which outlines the basis on which athletes would be selected for a number of World Cup events. One of the criteria specified that athletes had to obtain a prescribed number of points in races within the previous 365 days.
7. On December 18, 2020, NC published the names of athletes who had been selected for the Team. NC identified five female athletes and six male athletes. Ms. Weaver was not included, as NC deemed that she did not meet the Criteria.
8. Ms. Weaver challenged the decision, contending that NC had been “grossly unfair and unreasonable” in writing eligibility criteria that were extremely difficult, in the circumstances, for her to achieve. She argued that due to the global pandemic, many races had been cancelled, depriving her of the opportunity to achieve the requisite number of points within the past 365 days in order to be named to the team.
9. Ms. Weaver argues that although she does not meet the FIS point eligibility criteria, NC should, on her behalf, seek an exemption from those criteria given that the pandemic amounts to exceptional circumstances.

¹ All references to the Code are to the 2015 version since the appeal was filed in December 2020. Although a revised version of the Code came into effect January 1, 2021, the substantive provisions relevant to this appeal remain largely the same.

10. Ms. Weaver further contends that NC was unwilling to allow her to obtain eligibility to race even though it had done so for other athletes in the past.
11. NC has the initial burden of establishing that the selection criteria were appropriately established, and that the selection decision was made in accordance with the criteria. If that burden is satisfied, the onus then shifts to the Athlete to demonstrate, on a balance of probabilities, that she should have been selected in accordance with the criteria. (*Code* Section 6.7)

The Criteria

12. This case involves selection to participate in an international sporting event during a global pandemic. Many sports, including cross-country skiing, have been severely disrupted. Athletes have also been affected, many losing opportunities to both train and compete in international events. (see also *Alex Lepage-Farrell v. Speed Skating Canada*, SDRCC 20-0472)
13. The Criteria were expressly developed with the pandemic in mind. The Criteria contains the following disclaimer:

Due to the changing and unpredictable events surrounding COVID-19, the terms, selection criteria, and competitions outlined in this document are subject to change at any time.

Nordiq Canada's top priority is health of athletes and staffs. (sic) As such, it will follow best practices and recommendations from government health officials (domestic and international) in determining whether or not to proceed with any competition trip in this document [...]
14. Notwithstanding the challenges of the pandemic, NC established the Criteria with the objective of increasing Canada's nation ranking and achieving international podium performances:

1. *General Information and Objectives*

- 1.1 To maximize Canada's nation ranking through world cup points, while managing risk associated with COVID-19 pandemic. We will take Canada's most competitive performers to achieve these goals, as singularly, our goal is to achieve the necessary points for Canada to maintain or improve its nation rankings so as to secure quota spots 2022 Olympic Games. (sic)
- 1.2 This document establishes the eligibility and criteria used by Nordiq Canada for selecting athletes for international competition trips.
- 1.3 The process for the creation of Selection criteria is guided by the NST Selection, Nomination and Announcement Policy.
- 1.4 Final decision authority for all selections is the Nordiq Canada High Performance Director (HPD) or their designate.
- 1.5 [...]

1.6 The Nordiq Canada HPD has the authority, and reserves the right to amend this document prior to the selection date under the following circumstances:

[...]

1.7 [...]

1.8 This policy does not require Nordiq Canada to select any or all athletes to the maximum number of allotted quota positions.

2. *Eligibility Criteria*

[...]

2.3 Athletes must have the required FIS points to start in the 2020-21 World Cups in the event from the 2020-2021 NST list they are selected from OR have accumulated World Cup Points in the 2019-2020 competition season. (my emphasis)

2.4 Athletes must meet all FIS and other event entry standards for the competition(s) for which they qualified. The World Cup entry requirements are located on the FIS website (section 3.2)

...

3. *Selection Guidelines*

3.1 Only events listed in this document are considered for selection rankings and standards.

3.2 Unless otherwise stated in the specific event selection criteria, in the event of a tie after the selection criteria has been applied, it will be broken by the number of 1st place finishes, the number of 2nd place finishes, etc. in the selection competitions. If there is still a tie, the HPD will make the final decision.

3.3 Team size has been established up to a maximum of 5 people per gender per age category. The HPD reserves the right to choose a number within this maximum to ensure the health and competitiveness of the team.

4. *World Cup (WC) Selection Criteria*

4.1 Athletes must have the required FIS points to start in the 2020-21 World Cups in the event from the 2020-2021 NST list they are selected from OR have accumulated World Cup Points in the 2019-2020 competition season. (my emphasis)

15. The 2020-2021 eligibility requirements are substantively the same as the 2019-2020 eligibility requirements. As with the 2019-2020 Criteria, the current Criteria specify that, as a condition of selection, athletes must meet all FIS and other event entry standards for the competition for which they qualify. The 2020-2021 Rules for FIS Cross-Country World Cup are identical to the 2019-2020 Rules. Those Rules

require that, for sprint World Cups, athletes must have at least one result better than or equal to 120 FIS points, and for distance World Cups, athletes must have at least one result better than or equal to 90 FIS points (for women). The required number of FIS points are the same in 2020-2021 as they were in 2019-2020. This requirement was highlighted in communications from NC to the athletes.

16. As a result of the pandemic, the 2019-2020 FIS race season was attenuated. Many races were cancelled effective March 12, 2020 and Canada did not host any races in 2020. Where the Criteria differ between 2019-2020 and 2020-2021 is that athletes could satisfy the eligibility criteria if they had accumulated World Cup points during the 2019-2020 season.
17. Although NC originally established the Team size at four athletes per gender for the World Cup Period 3 races and at five athletes per gender for the World Ski Championships; as the pandemic circumstances evolved, domestic races that would have been used for selection purposes for international events were cancelled and NC re-evaluated the Criteria.
18. As a result of the changed circumstances resulting from the pandemic, NC decided to use the 2020/21 National Ski Team (“NST”) ranking lists to select the Team. NC was of the view that these ranking lists were the most transparent and fair method of selecting the Team.
19. Following the cancellation of domestic races, NC established the Team size at five athletes of each gender, in part to eliminate the necessity of the selected athletes to travel between Canada and Europe between the World Cup and the World Ski Championships, and thereby avoiding the need to meet quarantine requirements twice.
20. The Criteria were posted on December 16, 2020.

ARGUMENT

The Athlete

21. Ms. Weaver does not dispute that the Criteria were appropriately established. However, she argues that the application of the Criteria and the decision were grossly unreasonable and unfair, and that she should be selected to the Team.
22. She argues that NC’s goals of having their best ranked athletes compete to maintain or improve Canada’s nation ranking are difficult to achieve given that athletes have had their opportunities “hijacked” by the pandemic. She says, and I agree, that the circumstances are both unique and exceptional.
23. Ms. Weaver argues that, despite the Criteria explicitly stipulating that the Team will consist of five athletes of each gender, NC has in fact selected six men. She submits that, in doing so, NC has demonstrated its willingness to apply the Criteria in such a way that gives priority to NC’s goal of maximizing quota spots for the 2022 Olympic Games.

24. Ms. Weaver notes that the Criteria invoke the FIS eligibility rule requiring athletes to have attained prescribed FIS points. She points out that the actual FIS Rule (Rule 3.2), on which Sections 2.3 and 4.1 are based, provides that the World Cup entry requirements call for each competitor to have reached at least one result better than or equal to 120 FIS points during the last 365 days as well as for exceptional circumstances, that is - athletes who did not meet World Cup entry requirements can be allowed to start the race. In those exceptional circumstances, the national association must make written application for the athlete to race.
25. The first World Cup Period 3 sprint race will take place in Falun, Sweden on January 31, 2021. Consequently, the FIS rules require meeting the standard in an event that took place no earlier than February 2, 2020. Given the cancellation of the races due to exceptional circumstances, Ms. Weaver achieved the required number of FIS points, at a race on January 11, 2020, which is outside the 365 day period.
26. Ms. Weaver submits, however, that FIS Rule 3.2 must be read in its entirety:
- 3.2 World Cup Entry Requirements
- 3.2.1 The quota is valid under the condition that every individual competitor [...] has reached during the last 365 days at least one (1) result better than or equalizing:
[...]
- 3.2.3 Other exceptions
- In exceptional circumstances (top athletes from Biathlon, Nordic Combined and developing nations...) athletes who didn't reach the World Cup entry requirements can be allowed to start.
- The respective NSAs have to apply in a written way to the FIS office latest 1 week before the event. With taking all in considerations, FIS Race Director will take the decision and will inform the OC and the jury.
27. Ms. Weaver contends that even though she did not meet the 365 day requirement, NC is bound by the whole of Rule 3.2, including 3.2.3. She argues that NC has a good faith obligation to pursue an exemption from the 365 day requirement on her behalf given the exceptional circumstances presented by the COVID-19 pandemic. She submits that NC has made such requests in the past and that the granting of such requests is not uncommon.
28. Ms. Weaver submits that, given her strong sprint ranking and NC's stated goal of maximizing Olympic quota spots, it was unreasonable and unfair for NC not to have sought an exemption to obtain her eligibility to compete in the World Cup Period 3 sprint races.
29. Ms. Weaver also argues that the Affected Party obtained FIS qualifying points at a race on January 30, 2020, which was not within 365 days of the January 31, 2021 race in Falun. She contends that NC misapplied the FIS 365 day rule in the case of the Affected Party, and for NC to consider the Affected Party to be eligible for selection was unreasonable and wrong.

30. Ms. Weaver also says that three of the female Team members do not meet the FIS 365 day standard for World Cup distance races. She argues that it is unfair that NC will likely make a request for an exception for those athletes but will not do so for her.

Nordiq Canada

31. NC argues that the criteria were appropriately established and that they are both justified and reasonable. NC further argues that its decision not to select the Athlete to the Team was made in accordance with those criteria.

32. NC says that the 2020 Criteria were initially established to bring Canadian Nordic Skiing back to the level of achieving podium performances at the international level, with a view to increase Canada's nation ranking. Due to the changed circumstances presented by the COVID-19 pandemic, NC's performance objective shifted to "maximize Canada's nation ranking through World Cup points [...] to achieve the necessary points for Canada to maintain or improve its nation rankings so as to secure quota spots [for the] 2022 Olympic Games."

33. NC acknowledges that the Affected Athlete, who was selected as the fifth Team member, was the sixth ranked sprint athlete pursuant to the Canadian Points List ("CPL"), whereas Ms. Weaver was the fifth ranked sprint athlete. However, because the Affected Athlete achieved the specified FIS points on January 30, 2020, meeting the 365 day requirement, she was selected ahead of Ms. Weaver.

34. NC contends that it has never included a specific reference to Section 3.2.3 of the FIS Rules in past versions of its selection criteria, and that any references to this section of the Rules "would negate the requirement for minimum eligibility standards and undermine the purpose of having eligibility requirements in the first place."

35. NC says that it exercised its discretion to select a sixth male, in excess of the stated five person per gender team size, based on that athlete's performances. NC notes that the sixth male athlete was the second ranked sprint athlete pursuant to the CPL lists, is Canada's highest internationally ranked sprint racer, has been selected to the 2021 U23 World Ski Championship team, and is best positioned to enable NC to achieve its competition trip criteria objective. NC further notes that, despite being a sprint specialist, the athlete achieved a 13th place in a distance race at the 2020 U23 World Ski Championships. NC further notes that this athlete's sprint points were on average 30% below the minimum point standards while Ms. Weaver's sprint points were, on average, 5% above the minimum point standard, and that the male athlete's distance points in the 2019-20 season qualify him to meet the minimum points, while Ms. Weaver's points exceed the minimum threshold with the lowest distance points placing her 37% over the standard.

36. NC contends that the male athlete, unlike Ms. Weaver, has demonstrated his ability to perform and that he will be able to contribute to achieving the stated performance objectives for the trip.

37. NC further acknowledges that the Criteria do not provide it with the specific authority to exercise its discretion to add a sixth male athlete. It says that, in its haste

to develop revised criteria for World Cup Period 3 after the cancellation of all domestic competitions, it accidentally omitted a clause that had been previously included in the 2019/20 competition criteria which enabled it to exercise its discretion this way. NC says that while this omission was regrettable, the selection of the sixth male athlete was justified. NC submits that, even if I were to find that NC did not have the ability to select an additional male athlete to the Team according to the Criteria, this decision should not result in Ms. Weaver being added to the Team.

Affected Party

38. Ms. Leclair supports NC's position. She submits that it is not reasonable to conclude that FIS will write different rules for leap years and submits that NC validly selected her despite the fact that her qualifying results were obtained 1 day outside the 365 day period.

ANALYSIS

39. In *Palmer v. Athletics Canada* (SDRCC 08-0080) Arbitrator Pound determined that the standard of review of decisions of national sports organizations is that of reasonableness, not correctness. In doing so, he concluded that arbitrators will be willing to interfere with a sport organization's decision in relation to that sport

[...] only when it has been shown to their satisfaction that the impugned decision has been so tainted or is so manifestly wrong that it would be unjust to let it stand.

40. Provided that a National Sport Organization's (NSO) decision falls within a range of possible, acceptable outcomes that are defensible in light of the Selection Criteria and the facts, the Tribunal will not interfere with the decision. (see *O'Neill and Canoe Kayak Canada* (SDRCC 19-0415))
41. I am not persuaded that NC's decision not to select Ms. Weaver to the Team did not fall within a range of possible outcomes. I am also not persuaded that the decision was grossly unfair or unreasonable.
42. Ms. Weaver agrees, and I find, that that the Criteria were appropriately established.
43. Given that the eligibility requirements are largely unchanged from 2019-2020, I find there is nothing unfair or unreasonable about those requirements.
44. Ms. Weaver also concedes that she did not meet the eligibility criteria – that is, she does not dispute that she did not have at least one result one result better or equal to 120 FIS points within 365 days. On that basis, I find that she was ineligible for selection to the Team under Section 2.3 of the Criteria.
45. Although Ms. Weaver submits that NC is bound by FIS Rule 3.2.3, there is nothing in the Criteria that incorporates this provision either expressly or by implication and I am not prepared to read it in.

46. Furthermore, as Rule 3.2.3 gives a FIS race director the discretion to permit athletes to start races in exceptional circumstances, it is difficult to understand how NC could adopt this provision as part of its own Criteria.
47. Rule 3.2.3 is a discretionary rule, to be exercised by FIS officials in exceptional circumstances. While there is little guidance both with respect to when an exception should be sought and when it might be granted, the wording suggests that they would be granted only to 'top athletes from Biathlon, Nordic Combined' and 'athletes from developing nations', of which Ms. Weaver is neither.
48. Similarly, eligibility criteria should be, as far as possible, measurable and predictable. Rule 3.2.3 is neither, and I find, as NC argues, that the Rule "is not intended to be used to procure entries for athletes who have otherwise been unable to satisfy the relevant eligibility requirements on the basis of their performances alone."
49. Further, the COVID 19 pandemic is not an exceptional circumstance with respect to this athlete. Ms. Weaver had the same advantages and disadvantages as the other athletes selected to the Team. Not only is the pandemic a circumstance which affects all athletes similarly, it is explicitly recognized in the Criteria.
50. However, even if I were to find that NC was bound by FIS Rule 3.2.3, at most, it would provide NC with the discretion to seek an exception from the 365 day qualifying period on Ms. Weaver's behalf. Even if NC sought such an exception, there is no assurance Ms. Weaver would be able to start any race, as the decision to grant such an application rests with the FIS Race Director, not NC.
51. I am not prepared to make an order compelling NC to make such an application on Ms. Weaver's behalf. In my view, the decision about whether an exception should be sought is a discretionary one. Therefore, I must consider whether NC exercised such discretion fairly; that is, whether it considered relevant factors and did not consider irrelevant factors.
52. Ms. Weaver is ranked 250th amongst the female sprint athletes and 1537th amongst the female distance athletes internationally. While NC has made applications for exceptions in previous years, I accept NC's submission that those were made for athletes who had already satisfied eligibility rules for races in one discipline (such as a sprint race) but not in the other discipline (the distance race) to ensure that athletes who are already competing at a World Cup have sufficient race opportunities, and that the applications were not made in an attempt to qualify an otherwise ineligible athlete. NC agrees that it may seek such exceptions for the athletes who have already qualified for the Team, to ensure that they obtain international race experience. In the absence of any evidence of bad faith, I find no basis to interfere with NC's decision not to seek an exception on Ms. Weaver's behalf.
53. I have considered Ms. Weaver's argument that the Affected Party obtained her FIS points in a race on January 30, 2020, which, given that 2020 was a leap year, brought her outside the 365 day window. Ms. Weaver did not seek to have the Affected Party disqualified, rather, she sought to have that error addressed by an order naming her to Team.

54. I make no finding about whether or not NC erred in naming the Affected Party to the Team based on the fact that 2020 was a leap year, as the issue before me is simply whether or not NC's decision not to select Ms. Weaver for the Team was unreasonable. I have found that it was not.
55. Furthermore, even if NC's decision to name the Affected Party to the Team was made in error, on which I make no finding, I would decline to grant Ms. Weaver's requested remedy; that is, to order NC to name both Ms. Weaver and the Affected Party to the Team. To do so would compound any error rather than correcting it.
56. Similarly, although Ms. Weaver contends that NC failed to follow its own Criteria by selecting a sixth male to the Team, the issue before me is not whether other athletes were unfairly selected to the Team, but rather, whether NC's decision not to select her was reasonable and justifiable. I make no finding about whether NC's decision to select a sixth male athlete to the Team was made in accordance with the Criteria. However, to make an order adding Ms. Weaver to the Team based on any potential error would, as with the remedy she sought relating to the Affected Party, simply compound any error rather than correct it.
57. I wish to thank counsel for their submissions in this appeal given the short time period, and the time of year this matter was held.

CONCLUSION

58. The appeal is dismissed.

COSTS

59. Under Section 6.22 of the *Code*, an Arbitrator has the power to make an award of costs.
60. I am not inclined to make an award of costs. However, if either party wishes to make such application, they should do so no later than 4:00 p.m. (EST) January 25, 2021. The submission should address, among other things, the outcome of the proceedings, the respective financial resources and conduct of the parties and any settlement offers.
61. If costs are applied for, and the party against whom costs are sought opposes the request, the responding party shall have until 4:00 p.m. (EST) on January 28, 2021 to file a written response.

DATED: January 21, 2021, Vancouver, British Columbia



Carol Roberts, Arbitrator