

**BEFORE THE ISAF DISCIPLINARY
COMMISSION**

ISAF CASE 2013/017/DC

IN THE MATTER OF:

AL SCHONBORN (CAN)

**RULE 69.3 PROCEEDINGS BY SAIL
CANADA**



DECISION

1. REFERRAL TO THE COMMISSION

1.1 On 30 December 2013, the Chief Executive Officer received a report from Sail Canada under ISAF Regulation 19 reporting a hearing and sanction imposed under the provisions of RRS 69.3 against Mr Al Schonborn ("the Respondent") (all together "the Report").

2. APPOINTMENT OF PANEL

2.1 On 10 January 2014, the Commission Chairman appointed the following panel of the Commission pursuant to Rule of Procedure 5.1:

- (a) Mr David Tillett (AUS) – Panel Chairman
- (b) Mr Hirobumi Kawano (JPN)
- (c) Mr Jorge Barreda (PER)

2.2 This case is the second time the matter has been reported to ISAF. The first set of proceedings were reported to ISAF on 9 December 2013 and, by a decision dated 23 December 2013, the Commission ordered that the case be sent back to Sail Canada for reconsideration due to procedural irregularities.

3. The Panel appointed to hear this case is the same panel as in the first set of proceedings. The Panel notes this decision was made by the Commission Chairman due to the Panel's familiarity with the circumstances of the case and because the original decision was made on the grounds of procedural irregularity alone. The Panel notes that no objection has been made by any of the parties to the members of the Panel.

4. PROCEDURE

4.1 The Respondent in this case is represented by Mr Michael Schoenborn. The MNA is represented by Mr Paddy Boyd, its Executive Director.

4.2 On 8 January 2014, the Chief Executive Officer received submissions from the Respondent with respect to the Report.

4.3 On 20 January 2014, the Chief Executive Officer requested that the Respondent confirm whether or not he wished to make further submissions to the Panel. On 21 January 2014, the Respondent confirmed that he did not wish to make any further representations (the Respondent's submissions having been received during the previous case).

- 4.4 The Panel notes that Sail Canada has seen the submissions of the Respondent (they were sent to Sail Canada during the first case) and it has had the opportunity to address them in the Report.
- 4.5 As part of the procedure before the Panel, the Respondent queried whether the suspension of his eligibility (both Competition Eligibility and ISAF Eligibility) would be suspended pending ISAF's decision. The Chief Executive Officer, on advice from the Panel Chairman, advised that this was not the case and the decision was Sail Canada was effective immediately (albeit subject to confirmation or otherwise by ISAF).
- 4.6 On 31 January 2014, the Panel indicated that it was minded to not confirm the decision of Sail Canada and would consider amending the sanction imposed. The Panel set out its brief reasons for doing so. In accordance with the Rules of Procedure, both parties were invited to make submissions on sanction and these were received from each.
- 4.7 The Panel noted that Sail Canada submitted further information concerning alleged misconduct of the Respondent in its final submission. The Panel has no regard to that aspect of Sail Canada's submission as this post-dates the relevant Committee's decision that forms the subject of the Report.

5. JURISDICTION

- 5.1 The Respondent and Sail Canada are both subject to the jurisdiction of ISAF in this case as both RRS 69 and ISAF Regulation 19 are defined as racing rules and the subject matter of this case derives from a dispute concerning the Respondent's conduct following an event protest hearing and subsequent appeals.
- 5.2 Under ISAF Regulation 19.17, ISAF may confirm, revise or annul the decision of Sail Canada set out in the Report. Under ISAF Regulation 35, ISAF's disciplinary functions are carried out by its Disciplinary Commission.
- 5.3 Rule of Procedure 8.3 sets out the responsibilities of the Panel in this type of case:

"The Panel shall consider the Report and, if it considers that no further action is required, then it shall confirm the original decision and notify the Respondent and the submitter of the Report of that fact."

- 5.4 If the Panel considers that further action is required (that is revision or annulment of the decision), then it is required to allow representations to be made prior to any decision being made.

6. FINDINGS OF SAIL CANADA

- 6.1 The Respondent's conduct concerned public and derogatory criticism of the Protest Committee, the Regional Appeals Committee and the National Appeals Committee. The criticism was made via email (to a national and international audience of around 50 individuals) and briefly on internet forums (the content was later removed).
- 6.2 Sail Canada concluded that the Respondent's conduct amounted to gross misconduct and breached RRS 69.1(a).
- 6.3 Before Sail Canada, the Respondent expressed regret about some of his language but the Report states that he did not apologise prior to, or during, the hearing. The Respondent had several good character references from his class that were considered by Sail Canada.
- 6.4 Sail Canada imposed the following sanctions on the Respondent:
 - (a) A letter of apology shall be written (and approved by the panel chairman) to each of the affected Committees

- (b) Assurance that the entry on the subject website, offering copies of his 11 October posting, is withdrawn
- (c) A posting (approved by the panel chairman) describing the hearing results, shall be made on the same website as the offending article
- (d) Suspension from competing, either as skipper or crew, in any event in the sport of sailing in Canada until 15 September 2014
- (e) Suspension of ISAF Eligibility until 15 September 2014

7. THE RESPONDENT'S SUBMISSIONS

- 7.1 The Respondent's representative made submissions to the Panel to the effect that the decision should not be upheld on three grounds:
- (a) The hearing was conducted improperly
 - (b) The finding of guilt was incorrect
 - (c) The sanction is disproportionate
- 7.2 The Respondent invites the Panel to annul the decision of Sail Canada, or alternatively to amend it with a new sanction.
- 7.3 The Panel does not propose to rehearse all the Respondent's submissions here, but it has considered them fully and addresses the main points below.

8. DISCUSSION

Hearing Process

- 8.1 The Respondent challenges the conduct of the hearing and in particular the inquisitorial nature of the process before the Sail Canada panel. The Respondent alleged the Chairman of the Sail Canada panel used his multiple roles as investigator, prosecutor, procedural supervisor and committee member to his detriment, including obstructing his ability to present his case. He also challenges the fact that the Respondent was not legally represented (although he was represented).
- 8.2 The Respondent further alleges that no case to answer was presented by the Sail Canada, and consequently the procedure was flawed.
- 8.3 Sail Canada has not commented on the procedure used by its panel.
- 8.4 The Panel has considered the account of the hearing procedure set out by the Respondent and has concluded, even based on the Respondent's account, that the Sail Canada process was correct and proper.
- 8.5 It is well established that the hearing process used under RRS 69 is not adversarial in nature and is an inquisition by the hearing panel into the facts of the case and the report it has received. By participation in the event, the Respondent entered into a contract agreeing to the procedure permitted by the relevant rules (see RRS 3). The Respondent received the report before the hearing in writing and was represented at the hearing. The fact his preferred choice of counsel was not available is unfortunate but it was well within the case management powers of the panel to refuse an application to adjourn on this ground – alternative counsel can always be instructed in such circumstances if the Respondent wished legal representation.
- 8.6 The Panel is mindful of the principle of ISAF Case 48 (interpreting RRS 63.2, Hearings: Time and Place of the Hearing; Time for Parties to Prepare) which is clear that the RRS aim to prevent miscarriages of justice and not provide loopholes for parties to attack decisions. The

overriding duty on Sail Canada was to conduct a fair process and the Panel considers it has done so, including:

- (a) the Respondent was given written notification of the report being considered;
- (b) the Sail Canada panel was independent and qualified in the RRS;
- (c) the Respondent was present throughout the hearing, able to address the panel on all evidence presented and able to make submissions to the panel;
- (d) the Respondent was represented and supported at the hearing;
- (e) the panel was presented with all relevant material; and
- (f) the panel did not consider any irrelevant material.

Decision on gross misconduct

- 8.7 The Respondent challenges the decision that he broke RRS 69.1(a) by committing gross misconduct. The Respondent submits that his reaction to the Appeal Committees' decisions was based on a lack of understanding of their decision and not a pre-meditated or deliberate attempt to undermine their authority.
- 8.8 The Respondent also challenges the decision to find he brought the sport of sailing into disrepute. He alleges that no evidence was presented concerning detriment to sailing (with the exception of the fact of the website postings occurred and they were specialist sites). Sail Canada appears to have concluded that the fact the publication was made on a site accessible to the general public was sufficient to bring the sport into disrepute.
- 8.9 With respect to the first issue (the dissent from the decision of the appeals Committee), the Panel is mindful of the need for decisions of officials in sport to be respected and not open to abuse. The Panel considers that the Respondent's comments, whatever their motivation, were wholly disrespectful. It is always acceptable to have a difference of opinion with officials, and indeed it is inevitable that from time to time officials and competitors will disagree on decisions made. However, differences of opinion must be raised in a respectful manner and at an appropriate time and place.
- 8.10 To publicly refer to the Committees as "*incompetent*" or "*lazy*" and to suggest that, "*Any asshole could put the two facts found together, as well as it was a sad realisation that the supposed experts needed to be led through the course of events like little children being led across the street*" is totally unacceptable and is clearly a gross breach of good manners and sportsmanship. The Panel notes that the Respondent admitted he made these statements and published them.
- 8.11 Consequently the Panel is comfortably satisfied that the Respondent breached RRS 69.1(a) and has therefore committed gross misconduct.
- 8.12 With respect to the second issue (bringing the sport into disrepute), a majority of the Panel agree with the Respondent's submissions on this point. In order for the sport to be brought into disrepute, there must be evidence that it has so been and findings made by the hearing panel accordingly. The rule does not refer to the possibility or opportunity for it to be brought into disrepute; it refers to a situation where it has been.
- 8.13 In the Court of Arbitration of Sport case, *D'Arcy v Australian Olympic Committee CAS 2008/A/1539*, the Court of Arbitration of Sport defined the concept of disreputable conduct by stating that "*Bringing a person into disrepute is to lower the reputation of a person in the eyes of ordinary members of the public to a significant extent*". RRS 69.1(a) requires in respect of this limb, "*conduct bringing the sport into disrepute*". The Panel does not believe there is any actual evidence of the bringing of the sport into disrepute and this limb requires evidence of disrepute. The mere making of such derogatory comments does not of itself amount to conduct bringing the sport into disrepute.

- 8.14 In addition, the period of time during which the Respondent's comments were available was short and the website was not by all accounts a popular one frequented by the general public. The mere fact that the website was open to the public is insufficient in our view to found a charge of disrepute.
- 8.15 Therefore, the Panel is not comfortably satisfied that the Respondent brought the sport of sailing into disrepute and he has not committed gross misconduct in this respect.
- 8.16 The decision of the Panel on this issue was not unanimous and was reached by majority vote. The Panel notes that following the communication of the brief reasons on this point to Sail Canada, it accepted the decision in its submissions on sanction to the Panel.

Decision on sanction

- 8.17 It follows from the Panel's findings above that the decision of Sail Canada on sanction must be reviewed.
- 8.18 With respect to the aggravating circumstances of this case, the Panel notes:
- (a) whilst it is noted that the communication did not name the people involved, the communication nevertheless constituted a significant public abuse of officials who were carrying out an essential role within the sport; and
 - (b) there is a clear and overriding need to uphold the system of officiating in our sport and the respect that must be given to officials and the decisions made by them.
- 8.19 With respect to the mitigating circumstances of this case, the Panel notes:
- (a) the Panel has concluded that the gross misconduct committed is lesser due to the finding that the sport has not been brought into disrepute;
 - (b) the Respondent has apologised to the Committees and publicly;
 - (c) the Respondent's previous good record over a long period of time and significant contribution to the Wayfarer Class; and
 - (d) the Respondent has been under suspension since the findings of Sail Canada were issued.
- 8.20 Taken these factors together (the most significant of which is the finding referred to in paragraph 8.15 above), the Panel has concluded that it is appropriate to reduce the sanction imposed on the Respondent. However, a period of suspension is warranted due to the nature of gross misconduct.
- 8.21 The Panel has considered previous decisions by ISAF with respect to suspensions of eligibility for gross misconduct. Two cases are relevant. In the 2012 case of Kuikka, ISAF confirmed an ISAF Eligibility suspension of eight months for arguing with race officials. In the 2007 case of Ross, ISAF confirmed an ISAF eligibility suspension for five months for abusive language used in a threatening manner against witnesses at a protest hearing.
- 8.22 The Panel will therefore amend the sanction imposed to be a suspension of Competition Eligibility and ISAF Eligibility to a period of nine months, commencing on 23 November 2013. The period will therefore end on 23 August 2014.

9. ORDERS

- 9.1 Therefore the Panel orders by a majority:
- (a) the decision to find the Respondent broke RRS 69.1(a) by committing a gross breach of good manners and sportsmanship is confirmed;
 - (b) the decision to find the Respondent broke RRS 69.1(a) in respect of bring the sport of sailing into disrepute is annulled;

- (c) pursuant to ISAF Regulation 19.17, the decision is amended and the Respondent's Competition Eligibility and ISAF Eligibility are suspended until 23 August 2014; and
- (d) the Chief Executive Officer is to communicate this decision forthwith.

**David Tillett
Panel Chairman**

ISAF Disciplinary Commission

21 February 2014