

Australian Sailing Appeal Decision

2023-01 Subzero v Bellamy

Appeal by Subzero Lodged on 24th January 2023

Arising from

An incident between Subzero and Bellamy during the Commodore's Cup on 14th January 2023.

The protest committee found the protest was invalid and also refused a request from Subzero to reopen the hearing.

Subzero appealed citing:

1. A member of the protest committee had a conflict of interest and
2. The protest committee failed to properly interpret the 'First reasonable opportunity' provision in rule 61.1

The appeal panel;

The following people have been appointed to the Appeal Panel for this appeal by Australian Sailing:

John Standley (IJ) Chair	Rosemary Collins (IJ)	Christina Heydon (NJ)
Lisa Bettcher (NJ)	Richard Slater (IU, IJ)	

The Protest:

The protest committee addressed an allegation of a conflict of interest of one of the protest committee members and found;

Procedural Matters:

CS objected to CJ participation in the hearing due to an unresolved bullying claim alleging that CJ was responsible for removing on several occasions an invitation to the 2021 PSYC Christmas party invite from PSYC Facebook account and requested that this conflict be noted.

Protest committee members DH and JB discussed the request and the decision based on the review of conflict of interest rules and concluded this was not a conflict of interest relating to the protest at hand and therefore not a valid objection to exclude CJ from the hearing.

They then went on and addressed the validity of the protest and found the following facts:

Protest is invalid for the following reasons:

Not Hailing Protest

Subzero hailed protest beyond hailing distance from CS own admission "they were beyond hailing distance when I hailed protest".

And the protesting boat Subzero did not inform Bellamy of Protest at the first reasonable opportunity which by CS admission was on Channel 77.

CS informed the race starter of the protest on Channel 77.

Not displaying a Protest flag within time

Subzero did not display a red flag at the first reasonable opportunity. CS stated initially that it took 5 to 10 minutes to display the red flag. This was because CS had to hand over the helm, retrieve the flag from the chart table (which was nearby) and then display the flag.

And citing the following rules

Rules taken into consideration with regards to this protest:

Appendix M Recommendations for Protest Committees

Appendix M2.3 Assess Conflict of Interest Definition: Conflict of Interest

Section 5 Part A 61.1 Protest Requirements / Informing the Protestee (sub paragraph A, subparagraph 1)

And concluded:

The protest is considered invalid and dismissed due to not notifying the protestee at the first reasonable time that they were being protested and failing to fly a red protest flag in a reasonable time.

The Appeal summary

Subzero appealed on the grounds that the protest committee:

1. failed to properly address a potential conflict of interest with one of the protest committee;
2. failed to recognise that considerable time was needed to allow a radio call to advise the protestee of the protest if they were out of hailing distance at the time the hail was made; and
3. failed to recognise that taking at least 5 minutes to display the protest flag was reasonable under the circumstances.

Appeal Panel discussion and conclusions

Appeal ground 1

The alleged conflict of interest arose from an unresolved allegation of bullying made by the protestor to the club against a member of the Protest Committee. The complaint was regarding the email exchanges between the Protest Committee member (in his capacity as club General Manager and Director) and the protestor / appellant.

In this case, the protest committee decided that the committee member did not have a conflict of interest as the complaint of bullying 'had no relevance to the Protest'.

The definition of 'conflict of interest' does not differentiate between a sailing related issue and a non-sailing related issue. A protest committee member that is the subject of a formal allegation of bullying by a party to the protest may reasonably appear to have a personal interest which could affect their ability to be impartial. This is especially the case if the formal allegation had not been finalised, or that the complaint was recent enough to still be pertinent. The committee member does not need to possess a personal interest that affects their ability to be impartial, merely they may reasonably appear to have a personal interest which could affect their ability to be impartial. When a committee member appears to have such a personal interest, the protest committee should then follow the processes detailed in rule 63.4.

It is apparent from submissions made to the appeal panel that the process dealing with the bullying allegation had not been concluded. In such a case it is highly likely that the protest committee member would reasonably appear to have a conflict of interest, satisfying the definition of conflict of interest. The protest committee, in stating that 'this was not a conflict of interest relating to the protest at hand and therefore not a valid objection', did not properly establish that the conflict of interest was not significant as required by rule 63.4(b).

On this ground the appeal is upheld but this is moot given the conclusions regarding appeal grounds 2 and 3.

Appeal ground 2

Based on evidence from the protestor during the hearing the protest committee concluded that the protestee was beyond hailing distance when they hailed 'protest'. The appellant claims that after luffing Subzero to avoid contact, they called '...do a 360. I am protesting you...' This suggests that the hail was only made after the manoeuvre to luff occurred and some time after the alleged incident.

Rule 61.1(a) requires that a boat hail 'Protest' and the first reasonable opportunity. The appellant has not presented any reasoning as to why they could not make a hail of protest prior to, or as they began to luff their boat. In this case, there was a reasonable opportunity to hail 'Protest' at the time of the incident and where the hail would be expected to be heard by the other boat. Waiting until after the luff (and with the boats now beyond hailing distance) means the hail was not made as required by 61.1(a).

The exception where a hail is not required (rule 61.1(a)(1)) does not apply in this incident as there was a period during this incident where the other boat was within hailing distance and there was a reasonable opportunity to make a hail.

A VHF call to the club starter is not required to advise of a protest under the racing rules (including the notice of race and sailing instructions). As an aside, if rule 61.1(a)(1) was to apply, a VHF call and request for acknowledgement would need to be directed to the protestee, not the club starter.

Accordingly, the protest committee was correct to find that the protestor did not comply with the requirements of rule 61.1 to inform the protestor at the first reasonable opportunity.

On this ground the appeal is denied.

Appeal ground 3

The protest committee determined that the protestor took between 5 and 10 minutes to display the protest flag. The appellant does not contest this fact in her appeal but submitted a long explanation as to why it took this long, involving:

- the need to hand over the helm to a less experienced crew member;
- supervise that crew member steering;
- step inside of the cabin to locate the protest flag from its normal location in the chart table;
- step back into the cockpit and check on the helm and other crew members;
- walking to the stern of the bridge deck and affixing the red flag to a lifeline.

In the context of the racing rules the first reasonable opportunity means as soon as practicable, not as soon as convenient. The rules do not require the helm to be the person to fetch and then displaying the protest flag, any crewmember is allowed to do that task. It is not reasonable to allow time for the helm to make arrangements to display the protest flag.

The description, given by the appellant in her appeal, of the actions taken to display the flag indicate it was displayed at the earliest convenient time and not as soon as practicable. This description also supports the protest committee's findings that the flag was not displayed at the first reasonable opportunity. On this ground the appeal is denied.

Overall conclusion

As discussed in appeal ground 1 the protest committee failed to follow correct procedure in relation to a possible conflict of interest. Notwithstanding this the protest committee's decision to find the protest invalid was based on the protestor's own evidence. The protestor repeated this evidence in the appeal submissions, clearly indicating that the protestor did not comply with the provisions of rule 61.1. Therefore, any reopening or rehearing should always result in the protest being found invalid.

Appeal Panel Decision

Subzero's appeal is denied.

The decision of the protest committee to find the protest invalid is upheld.