

Case number: NST-E22-73587

Case Title: Ryan Hughes v Paddle Australia

## Determination

### National Sports Tribunal General Division

sitting in the following composition:

Panel Member/s

Adam Casselden, SC

Eugénie Buckley

Dr Peter Fricker OAM

in the arbitration between

**Ryan Hughes**

***(Applicant)***

Represented by Leanne Nicholls (Parent)

And

**Paddle Australia**

***(Respondent)***

Represented by Ian Fullagar (Solicitor) of Lex Sportiva



## PARTIES

1. The Applicant athlete is a competitor in the sport discipline of canoe slalom seeking to represent Australia in the 2022 Under 23 Canoe Slalom World Championships in the Men's K1 event ("**the Event**").
2. The Respondent sporting body is the governing body in Australia for the sport of Paddle/Canoeing, which includes the discipline of canoe slalom, and is responsible for setting the relevant Selection Procedure Policy ("**the Policy**") and Under 23 Selection Criteria Supplement for Canoe Slalom ("**the Supplement**"), and for implementing that Policy and the Supplement.

## INTRODUCTION

3. The Applicant nominated for selection in the 2022 Under 23 World Championships team and took part in various selection competitions as required by the Policy and the Supplement. He was not selected for the World Championships, and by this appeal against his non-selection, he sought in particular, selection as the Men's K1 for the Under 23 World Championships and to be categorised as "developing" in 2022.

## NST JURISDICTION

4. It was agreed by the parties that the jurisdiction of the National Sports Tribunal was as provided by section 23 (1) (a), (b) (i) and (c) (i) of the *National Sports Tribunal Act 2019* ("**the NST Act**") and clause 9 of the Policy.

## FACTUAL BACKGROUND

5. Ryan Hughes was not selected for a 2022 Australian Team position in the Men's K1 for the Under 23 World Championships.
6. An athlete, Sophie Wilson, was Automatically Selected for the 2022 Canoe Slalom U23 women's K1 Team for the World Championships under Clause 3.2 of the Paddle Australia Selection Criteria Supplement 2022 Canoe Slalom U23 Team.
7. Sophie Wilson was selected for the 2022 Women's C1 Team to the (Senior) World Championships under the Discretionary Selection clause of the Selection Criteria Supplement 2022 Canoe Slalom (Senior) World Cup/Championship Team (Clause 4.2.7) which is for all intents and purposes the same as clause 3.2.3 of the Supplement.
8. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties it refers in its Determination only to the submissions and evidence it considers necessary to explain its reasoning.



## PROCEEDINGS BEFORE THE NST

9. The Applicant filed his Application Form on 16 March 2022. He sought expedition of the Application.
10. The NST Registry held a Preliminary Conference on 21 March 2022. Directions were made for the filing of submissions and evidence as well as the provision of documents by the Respondent as requested by the Applicant. Those documents were provided by the Respondent.
11. The Applicant filed his submissions and evidence on 26 March 2022, the Respondent on 29 March 2022 and the Applicant filed submissions in reply and further evidence on 01 April 2022.
12. It is noted that no persons may be impacted by any decision to overturn the non-selection of the Applicant.
13. The parties signed an Arbitration Agreement on 1 April 2022 whereby a number of procedural and jurisdictional matters were agreed. Under that Agreement it was agreed that the determination by the NST would represent full, final, and binding settlement of all issues raised in the arbitration by the Applicant, and that there would be no right of appeal from the determination of the NST in the General Division.
14. The hearing was conducted by videoconference on 4 April 2022, and the Panel reserved its decision.
15. No objection was made at the outset of the hearing to the composition of the Panel and at its conclusion the parties confirmed that their procedural rights had been fully respected.

## APPLICABLE RULES

16. The relevant provisions of the Policy are as follows:

1. *Introduction*

*PA's Objective when selecting Teams include but are not necessarily limited to:*

- a) *identifying and including the best performing Athletes to represent Australia, maximising the likelihood of success at the international competitions attended and/or*
    - b) *providing appropriate international competition opportunities for high performing, developing Athletes*

- 7 *Nomination and Selection*

*7.1 Athletes wishing to nominate for selection to a Team must comply with the procedure set out in the Selection Criteria Supplement, including meeting all relevant dates and requirements.*



*7.2 The Selection Panel shall apply the Selection Criteria Supplement when determining the Athletes for selection to any Team.*

*7.3 All other matters concerning selection are governed by this Policy, including the composition of the Selection Panel, eligibility of Athletes, notification of selected Athletes, appeals and withdrawal and replacement of selected Athletes.*

*9. Appealing Decisions*

*9.3.5 The decision of the NST will be final and binding on the parties.*

17. The relevant provisions of the Supplement are as follows:

*1. Definitions*

*“Minimum Performance Standards (MPS)” means the minimum performance standard required by PA for selection to a national team in addition to any other criteria as set out in clause 5 of this (sic) Criteria*

*“Team” means the 2022 Paddle Australia Canoe Slalom Team to compete at the 2022 ICF Canoe Slalom Under 23 World Championship Events.*

*Words not defined in these Criteria have the meaning ascribed to them in the Constitution of PA or the Policy unless a contrary meaning appears from the context*

*2. Selection Criteria and Process*

*Athletes may be selected to the Team in each respective Event, up to the maximum number of quota places (3) awarded to Australia by the ICF for each individual Event, as follows:*

*3.1 Selection Process – Domestic Ranking System*

.....

*3.2 Selection Criteria*

**AUTOMATIC SELECTION**

*3.2.1 The two (2) highest ranked eligible U23 Male and two (2) highest ranked eligible U23 Female athletes, based on the ranking system outlined in clause 3.1, AND, achieved at least 1 x U23 MPS in any of the selection trials outlined in clause 3.1.1, will be automatically selected in the Event or Events they achieve the ranking results.*

*3.2.2 To be clear:*



a) to be AUTOMATICALLY selected, an athlete must have achieved at least 1 x U23 MPS (or U21 MPS for eligible Athletes aged 21 years or younger).

b) an athlete who is ranked in the Top 2, who has not achieved 1 x U23 MPS (or U21 MPS), will not be AUTOMATICALLY selected, but may be selected by discretion according to Clause 3.2.3 (ie. the position does not automatically roll down to the next ranked athlete who has achieved MPS).

#### DISCRETIONARY SELECTION

The Canoe Slalom community has experienced challenges due to the impact of Covid 19, in light of this the selection panel will consider where teams are not filled to the maximum allocated spots, applying their absolute discretion to select athletes whose performances are suitable for international representation.

3.2.3 The Selection Panel, at their absolute discretion, may select additional athletes in Events up to the maximum number of quota places awarded to Australia by the ICF. In doing so, they will consider the following:

3.2.3.1 ranking of each athlete according to clause 3.1.4 of this (sic) Criteria

3.2.3.2 application of MPS according to clause 4 of this (sic) Criteria

3.2.3.3

3.2.3.4 performances in relation to the U23 MPS, or in relation to U21 MPS for those eligible for U23 and U21 aged athletes, respectively.

.....

#### 3.3 Reserves

The Selection Panel may, but are not obliged to, name Reserves for each Event at their absolute discretion in accordance with Clause 3.2.3.

#### 4 Minimum Performance Standards

4.2.4 If, for any reason, an athlete has not achieved MPS and the Selection Panel requires further evidence of an athlete's ability to achieve MPS, they may consider the following:

- Relevant performance times in relation to MPS from the athlete within the 2021 or 2022 calendar years, or
- Relative performances against other athletes who have achieved MPS during the 2021 or 2022 calendar years,
- Approved Extenuating Circumstances according to Clause 5



## MAIN SUBMISSIONS OF THE PARTIES

### Outline of Submission for the Applicant

18. The Applicant relied on the following grounds of Appeal under the Policy

*9.2.1. the applicable Selection Criteria Supplement has not been properly followed and/or implemented;*

*9.2.2. the selection decision was affected by actual bias;*

*9.2.3. there was no material on which the selection decision could reasonably be based.*

19. The Applicant contends that the Respondent failed to:

- (a) apply discretionary allowances equally to all U23 Athletes resulting in the Respondent's Selection Panel exhibiting actual bias in the allocation of team positions; and
- (b) follow the guidelines set out in clause 1 of the Policy to apply fair, consistent and transparent procedures and criteria in their use of discretionary allowances for the selection of Athletes to the U23 Team.

20. The Applicant relied in particular on Clause 3.2.3.4 of the Supplement which directs the Selection Panel to consider "Performances in relation to the U23 MPS, or in relation to U21 MPS for those eligible for U23 and U21 aged athletes, respectively"

21. The Applicant also relied on the Minutes of the 2022 Canoe Slalom U23 Team Selection Panel Meeting, which noted in respect of the Applicant:

*"K1M*

*Ryan Hughes (U21)*

*\* No MPS achieved*

*\* Best result (105.78%) is between 50<sup>th</sup> – 55<sup>th</sup> rank according to the selection increments \*  
2.8% from U21 MPS*

*\* Ranked 2<sup>nd</sup> in U23 rankings"*

22. Those minutes also noted in respect to Sophie Wilson:

*1W*

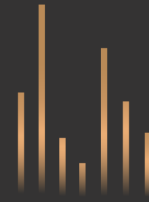
*Sophie Wilson*

*\* No athletes achieved U23 or U21 MPS achieved Sophie Wilson (U21)*

*\* No MPS*

*\* Best result (138.25%) is between 25<sup>th</sup> – 30<sup>th</sup> rank according to the selection increments -  
5% behind U21 MPS*

*\* Sophie best performance (138.25%) meets the following clause:*



\* 3.2.3.1 1st ranked

\* 3.2.3.4 clauses performance in relation to the U23 MPS or in relation to U21 MPS”

23. Furthermore, the minutes of the 2022 Canoe Slalom U23 and Senior Selection Panel Meeting contained details of the discretionary clause used to select Sophie Wilson as the Senior Reserve and for a World Cup 3 team positions:

*“4.2.6.1 - No athlete meets this criterion in K1W*

*4.2.6.2 - No athlete meets this criterion in K1W*

*4.2.6.3 - No athlete meets this criterion in K1W*

*4.2.6.4 - No athlete meets this criterion in K1W*

*K1W Discretionary selection:*

*Sophie (19yrs) and achieved U21 MPS (118.05%) which is only 1.3% Off U23 MPS which is one age bracket above*

***Sophie Wilson***

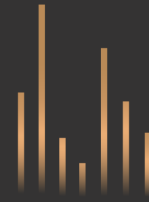
*Sophie (19yrs) and achieved U21 MPS (118.05%) which is only 1.3% Off U23 MPS which is one age bracket above*

*Sophie is a development athlete and will be preparing for the JNR worlds which follows World Cup 3 therefore this would be good preparation as a future podium athlete*

*Sophie beat Georgina on 3 occasions (Heat 1 and overall result at Oceania & Heat 1 at Australian Open)*

*As Sophie is a developing athlete who achieved U21 MPS and is closer to the U23 MPS than Georgina is to SNR MPS, the panel agree to select Sophie for the third position for World Cup 3 as a development opportunity, in line with the intent of the selection policy for World Cup.”*

24. The Applicant submitted that Selection Ranking Increments were used by the Selectors in their decision not to select the Applicant for an U23 K1M team position and this was the only point of difference noted by selectors between the Applicant’s and Sophie Wilson’s performance in all selection events.
25. The Applicant further relied on the 2022 Canoe Slalom U23 Team Selection Panel Meeting Minutes which noted *‘The selection ranking increments are to give a reference for when an athlete has not achieved a team (SNR/U23/JNR) MPS where they would potentially place at an international BME.’*
26. The Applicant also relied on a document received from the Respondent entitled “RE: Ranking increments” which was headed:
- ‘a supplement for the selection panel to make consistent and informed decisions for athletes who have not made an MPS performance and are being selected on discretion’*
27. In the Applicant’s submissions he alleges that the formula used to compile the data in this supplement is not referenced in any of the discretionary clauses for athletes who were outside of meeting the MPS in the 2022 Selection Procedure Policy or the Selection Criteria Supplement



2022 Canoe Slalom U23 Team. He submitted that the Criteria does state however, that selectors are to evaluate athlete performance based on the following clauses;

Clause 3.2.3.4

*'performances in relation to the U23 MPS, or in relation to U21 MPS for those eligible for U23 and U21 aged athletes, respectively.'*

Clause 4.2.4

*'If, for any reason, an athlete has not achieved MPS and the Selection Panel requires further evidence of an athlete's ability to achieve MPS, they may consider the following:*

- *Relevant performance times in relation to MPS from the athlete within the 2021 or 2022 calendar years,*
- *or Relative performances against other athletes who have achieved MPS during the 2021 or 2022 calendar years,*
- *Approved Extenuating Circumstances according to Clause 5"*

28. The Applicant also submitted that the use of the 'Selection Ranking Increments' by selectors to evaluate an athlete's performance seems to be in direct violation of clauses 7.2 & 7.3 of the Selection Procedure Policy, as stated in:

*Clause 7.2.*

*'The Selection Panel shall apply the Selection Criteria Supplement when determining the Athletes for selection to any Team.'*

*Clause 7.3.*

*'All other matters concerning selection are governed by this Policy, including the composition of the Selection Panel, eligibility of Athletes, notification of selected Athletes, appeals and withdrawal and replacement of selected Athletes.'*

29. The Applicant contends that the use of 'Selection Ranking Increments' in discretionary decisions does not appear to have been used consistently over all age categories and by all selectors, as it is not mentioned in the Senior Selection Panel Meeting minutes.

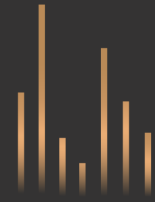
30. Hence he contended that the U23 Selectors exhibited 'actual bias' in their application of discretionary clauses in that:

- a) The U23 selectors did not make the same level of discretionary allowances for the Applicant as they did for Sophie Wilson.
- b) The selectors failed to apply a fair, consistent and transparent procedure and criteria by not applying discretionary clauses 3.2.3 and specifically clause 3.2.3.4 equally to all athletes who were outside of meeting the MPS required for Automatic Selection and by doing so, provided the basis for an appeal under clause 9.2.2. of the policy'.

31. The Applicant submitted that this actual bias was exhibited by the facts that:

- a) The Supplement discretionary clauses 3.2.3 and 3.2.3.4 were applied to Sophie Wilson in U23 C1W, where Sophie was 4.95% off meeting the U21 MPS required for automatic selection.
- b) The discretionary clauses 3.2.3.1 and 3.2.3.4 that were applied to Sophie Wilson were not equally applied to the Applicant even though
  - i. the Applicant ranked 2nd on the 2022 U23 Selection Ranking List





- ii. the Applicant was closer than Sophie Wilson to the U21 MPS required, being only 2.83% off the U23 K1M MPS
- iii. the Applicant showed a better performance overall in his class and was closer to MPS.
- c) The data taken from the official PA 2022 Selection event ranking results shows that the Applicant was closer to the MPS required for his class more consistently in comparison to Sophie Wilson.

RYAN HUGHES/SOPHIE WILSON RACE RESULTS	2022 Oceania Canoe Slalom Championships   ICF						2022 Canoe Slalom Australian open   ICF					
	HEATS		SEMI-FINALS		FINALS		HEATS		SEMI-FINALS		FINALS	
	SOPHIE	RYAN	SOPHIE	RYAN	SOPHIE	RYAN	SOPHIE	RYAN	SOPHIE	RYAN	SOPHIE	RYAN
U21 MPS REQUIRED IN EACH CLASS	C1W - 133.30%	K1M - 102.95	C1W - 133.30%	K1M - 102.95%	C1W - 133.30%	K1M - 102.95%	C1W - 133.30%	K1M - 102.95%	C1W - 133.30%	K1M - 102.95%	C1W - 133.30%	K1M - 102.95%
INDIVIDUAL RACE RESULTS - PERCENTAGE	274.70%	115.32%	138.25%	111.66%	141.76%		150.44%	162.50%	169.66%	107.52%	159.06%	105.78%
PERCENTAGE OFF U21 MPS REQUIRED	141.4% off MPS	12.37% off MPS	4.95% off MPS	8.71% off MPS	8.46% off MPS		17.14% off MPS	59.55% off MPS	36.36% off MPS	4.57% off MPS	25.76% off MPS	2.83% off MPS

- d) The Applicant's placement of 1<sup>st</sup> overall in U23 K1M at the 2022 Aus Open event, shows his ability to perform at a level equivalent or better to the other U23 K1M athletes and over a larger field than Sophie Wilson had in her U23 C1W events.
  - e) In relation to the reference in clause 3.2 of the Supplement to 'athletes whose performances are suitable for international representation' the Applicant was closer to MPS more consistently than Sophie Wilson but yet she was classed as more suitable for international representation. Sophie Wilson has failed to make semi-finals at the last international competitions in 2019. The Applicant has had extensive experience paddling white water courses and in competitions internationally in Canoe Slalom and Wildwater. He has held Aust K1M team positions for Wildwater in 2019, 2020, 2021 representing Australia internationally at World Championships.
  - f) The Selection Ranking Increments used by the U23 Selectors in their decision to not select the Applicant for an U23 K1M Aus team position, was the only point of difference between the Applicant and Sophie Wilson and should have never been used, as it is not noted as an official consideration under the discretionary clause in the Supplement. The Applicant further contended that Paddle Australia showed inconsistency in the selection of 2022 Australian Teams as follow.
32. The Applicant further contended that Paddle Australia not only showed inconsistency in the use of the discretionary clauses in the U23 Selections but also over all age categories and appeared to go to great effort in their attempts to find discretionary justification for Sophie Wilson's selection into a Senior K1W position. In doing so the selectors have completely disregarded the minimum performance standards required under the criteria and manipulated their wording, in an attempt to make Sophie Wilson's performance appear to suffice for Senior representation.
33. The 2022 Canoe Slalom U23/ Senior Selection Panel Meeting minutes note:
- 'As Sophie is a developing athlete who achieved U21 MPS and is closer to the U23 MPS than Georgina is to SNR MPS, the panel agree to select Sophie for the third position for World Cup 3 as a development opportunity, in line with the intent of the selection policy for World Cup.'*
34. The Applicant submitted that development opportunities and discretionary allowances offered to Sophie Wilson in the senior team were not equally applied to the Applicant in the U23 team



selections. The selectors' discretionary reasoning to allocate Sophie Wilson senior positions (when she did not meet the MPS required) seems to be in complete contradiction to the discretionary criteria used by U23 selectors which inhibited the development of U23 athletes, who did not meet the MPS.

35. In 2021 Paddle Australia made amendments made to the 2022 Senior Selection Criteria under clauses 4.2.2, 4.2.3, 4.2.4, 4.2.5 and 4.2.6.
36. The amendments waived the need for Junior and U23 athletes to make a Senior MPS and allowed them to gain a Senior team position by just making an U25 MPS. Paddle Australia made this amendment to the criteria to encourage development of U23 aged athletes to gain development in the senior classes.
  - a) Paddle Australia allocated Sophie Wilson senior K1W Team positions, even though she did not make the U25 MPS required under 2022 Senior Selection Criteria or nominate for a Senior Team position as required under policy clauses 3.3.2 in the 2022 Selection Criteria Supplement Senior.
  - b) Sophie Wilson was consistently over 5.72% off meeting the U25 K1W MPS required for her Senior K1W position. (Clause 4.2.6.1 allowed U23 athletes to make a lower MPS.
  - c) Sophie Wilson was more than 11.43% off meeting the Senior K1W MPS, the percentage calculated by the Respondent and deemed appropriate to measure and ensure athletes are at the performance standard required for international representation at senior events.

The table below shows Sophie Wilson's percentage off K1W U23, U25 and senior MPS;

SOPHIE WILSON K1W RACE RESULTS	2022 CANOE SLALOM OCEANIA   ICF						2022 CANOE SLALOM AUSTRALIAN OPEN   ICF					
	HEATS		SEMI-FINALS		FINALS		HEATS		SEMI-FINALS		FINALS	
Senior K1W Team Position-(under discretionary)	TOTAL SECONDS	% SCORE	TOTAL SECONDS	% SCORE	TOTAL SECONDS	% SCORE	TOTAL SECONDS	% SCORE	TOTAL SECONDS	% SCORE	TOTAL SECONDS	% SCORE
SOPHIE WILSON DID NOT MEET MPS REQUIRED												
Sophie Wilson K1W race results	109.02	118.57%	123.07	118.05%	123.86	118.81%	115.25	118.46%	137.73	127.93%	136.19	126.50%
Percentage off U23 K1W MPS of 116.74%		1.83% off MPS		1.31% off MPS		2.07% off MPS		1.72% off MPS		11.19% off MPS		9.76% off MPS
Percentage off U25 K1W MPS of 112.33%		6.24% off MPS		5.72% off MPS		6.48% off MPS		6.13% off MPS		15.60% off MPS		14.17% off MPS
Percentage off Senior K1W MPS of 107.92%		10.65% off MPS		10.13% off MPS		10.89% off MPS		10.54% off MPS		20.01% off MPS		18.58% off MPS

- d) Paddle Australia have added clause 4.2.7.3 into the 2022 Senior Selection Criteria Supplement, which enables selectors to allocate team positions without the athlete making the MPS required for that class. It does however state that in the use of 'discretionary allowances' selectors 'apply their absolute discretion to select athletes whose performances are suitable for international representation'.
37. The Selectors concluded that Sophie Wilson was deemed suitable for international representation when she was 5.72% off meeting the MPS required for this Senior class. The Applicant was not afforded these same discretionary allowances and classed as podium potential when he was only 2.83% off meeting the MPS required for his U23 class.
38. The Applicant made it clear that his argument is not that Sophie Wilson should not have received team positions under the discretionary clauses but that discretionary allowances applied to Sophie Wilson, were not equally, consistently, and fairly applied to all nominated athletes who were short of meeting the MPS required for automatic selection.



39. The Applicant also contended that the Respondent's use of the Covid discretionary allowances – clause 3.2 of the Criteria was not appropriately applied. Clause 3.2. Discretionary Selection states:

*'The Canoe Slalom community has experienced challenges due to the impact of Covid 19, in light of this the selection panel will consider where teams are not filled to the maximum allocated spots, applying their absolute discretion to select athletes whose performances are suitable for international representation.'*

40. The Respondent was aware of the impact that covid restrictions had on the Applicant's ability to train, as they were outlined in his 2021 appeal against the Respondent to the Tribunal. The Respondent was also aware that Victorian paddlers were impacted more significantly than paddlers in other states during 2020 and 2021 due to extended lockdowns and border closures.
41. The Applicant lives in Eildon in regional Victoria, and when paddlers in metropolitan Victoria had resumed training, covid restrictions still did not allow him to enter Melbourne from regional Victoria. He had no access to coaching for most of 2020 and 2021 and was unable to train on white water in 2021 due to limited water releases from the Eildon Dam. He moved to Penrith in December 2021, just after the N.S.W. border re-opened so he could concentrate 100% on his training at the Penrith Whitewater Stadium. He had 8 weeks of training prior to the first Selection Event and limited access to coaching.
42. As in any Elite sport, athletes need access to an extensive amount of coaching to keep up their performance level or they fall behind their competitors. Athletes also need regular access to facilities to train but unlike other sports who have multiple training facilities, Canoe Slalom has only one artificial whitewater course in Australia located at Penrith Whitewater Stadium. There is one other natural whitewater course located in a remote area of Tasmania that also suffices for training but it is rarely available and harder to access.
43. The Applicant contended that Covid allowances under the discretionary clause were not applied as follows.
- The Respondent did not apply the covid discretionary allowance to the Applicant, even though two positions were unfilled on the 2022 Australian Canoe Slalom U23 K1M team.
  - The Respondent did not apply this allowance to the Applicant, even though he had experienced more challenges in comparison to other Canoe Slalom athletes in relation to his ability to access coaching and white water due to the impact of covid restrictions.
  - The Respondent did not apply this allowance to the Applicant, even though he had still exhibited improvement in his performance despite all the disadvantages he had in relation to his ability to access coaching and white water due to covid restrictions in 2020 and 2021.
  - The Respondent did not apply this allowance to the Applicant, even though he has had extensive experience paddling white water courses and competing internationally in both Canoe Slalom and Wildwater and represented Australia internationally.
44. Covid has impacted all athletes and this is reflected in the ranking results with very few athletes being able to meet the MPS required in their class. All athletes (except two) who managed to make the MPS required for a team position had regular access to coaching and water



throughout covid either via the Respondent's subsidised sessions or because they had a parent/sibling to coach or train with regularly.

45. As a further submission, the Applicant contended that the Respondent did not adhere to the 2021 mediation agreement made between the Applicant and the Respondent (Case No: NTS-E21-41538). The mediation agreement signed by both parties stated that *'Ryan will be categorised as 'emerging' in the next round of categorisation which is equivalent categorisation of other junior team members'*

\*Athlete categorisation reflects the amount of support Paddle Australia will deliver to each athlete in regards to access to subsidised water sessions and coaching (N.C.E sessions). Although PA states that access to these water sessions are by 'invitation only' to athletes categorised in either 'developing or emerging', this is not the case with all athletes categorised above 'Developing' being allowed access to all sessions on a weekly basis. Athletes categorised in 'Emerging' receive minimal to nil access to these sessions.

46. The Applicant submits the Respondent has failed to apply the equivalent training opportunities under categorisation to the Applicant in comparison to his fellow junior team members.
- a) The Applicant moved permanently from Victoria to Penrith N.S.W in December 2021 to train at Penrith Whitewater Stadium. The Respondent only allowed him access to approximately 7 free water sessions and coaching from Nov 2021 to Feb 2022.
  - b) His placement under the categorisation in 'emerging' was not the equivalent to his Junior K1M team members, as they were placed above him as 'Developing'.
  - c) The majority of the other Junior team members were also categorised above him which allowed these athletes more access to free water and coaching.
  - d) His categorisation as "emerging" did not allow him to receive the equivalent access to training, coaching and water opportunities, as the other K1M team members during 2021 and led to his being disadvantaged in his ability to train at the same level as the other Junior team members.
  - e) The Respondent allowed a local Penrith paddler and fellow Junior team athlete, Sophie Wilson to access approximately 6 free water sessions per week, with coaching supplied by the Respondent. They also allowed Interstate paddlers, Sebastian Montalto, Mark Crosbee, and Hamish Dalziel who were the Applicant's fellow K1M team members, the ability to access approximately 6 free water sessions per week, with coaching supplied by the Respondent, in 2021 and during the lead up to the 2022 selection events.
  - f) The Respondent disadvantaged the Applicant not only in his ability to access training and coaching but also financially by not allowing him the same access to free water and coaching as the other team members. He was unable to access as many water sessions or coaching and was billed \$1677.00 in water costs over an 8 week period prior to the 2022 selection events.

47. The Applicant is seeking the following remedies:

- I. Selection for an U23 K1M Australian Team position.



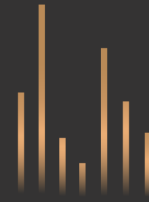
- II. Australian U23 K1M team representation at the 2022 Junior and U23 Canoe Slalom World Championships Ivrea, Italy.
  - III. 2022 categorisation as 'Developing'.
48. The Applicant also requests that the NST makes the final decision on whether or not the Applicant is entitled to a 2022 AUS U23 K1M team position following the arbitration hearing, and that the decision is not sent back to Paddle Australia selectors.

#### **Outline of Submissions for the Respondent**

49. The Respondent's objective when selecting Teams include but are not necessarily limited to:
- a) identifying and including the best performing Athletes to represent Australia, maximising the likelihood of success at the international competitions attended; and/or
  - b) providing appropriate international competition opportunities for high performing, developing Athletes.
50. Clause 4.8 of the Policy gives an absolute discretion to the Selection Panel to determine whether an Athlete is selected in a Team.
51. Clause 3.2 of the Supplement sets out the Selection Criteria. Clauses 3.2.1 and 3.2.2 set out the requirements for Automatic Selection. The Applicant did not achieve Automatic Selection. Clause 3.2.3 sets the requirement for Discretionary Selection.
52. The Respondent submitted that the Respondent's Selection Panel has at all times acted reasonably and properly followed and/or implemented the Policy and the Supplement. The Selectors have strictly abided by the Policy and Supplement and always considered their duties fairly, consistently, and transparently.
53. Given the Applicant did not achieve Automatic Selection under clauses 3.2.1 and 3.2.2, the Selection Panel followed clause 3.2.3 Discretionary Selection and reviewed the Applicant's performance against each of the criteria and this is outlined below:
- a) ranking of each athlete according to clause 3.1.4 of this Criteria - The Applicant is ranked 2nd in the K1M U23 rankings.
  - b) 3.2.3.2 application of MPS according to clause 4 of this Criteria - The Applicant did not achieve an U23 or Age (U21) MPS.
  - c) 3.2.3.4 performances in relation to the U23 MPS, or in relation to U21 MPS for those eligible for U23 and U21 aged athletes, respectively. - The Applicant's (U21) best performance (105.78%) was 2.1% off U21 MPS (age bracket). The Applicant's best result (105.78%) is between 50th – 55th rank according to the selection increments.
  - d) 3.2.3.5 approved extenuating circumstances that may apply as outlined in clause 5, in which case a selection decision will be based on the weight of performance based evidence in accordance with clause 6.2 (i) to (vi) inclusive, of this Supplement - This was considered but no extenuating circumstances were submitted for the Applicant
  - e) 3.2.3.6 Where the maximum number of ICF quota places are not filled by U23 athletes (based on the above criteria), and the number of Junior athletes who achieve Junior MPS



- exceed the ICF quota, in a particular Event, then the Selection Panel, may, but are not obliged to, select Junior athletes. - There were no junior athletes eligible as the junior standard was not high enough to bring a junior athlete into U23 racing.
54. After considering clause 3.2.3 the panel did not apply discretionary selection for the remaining positions in the U23 K1M class as the panel only applied the automatically selected athletes that made the automatic criteria as per clause 3.
  55. The Selection Panel had an unfettered discretion in making its decision under clause 3.2.3 of the Supplement. The “COVID-19” obligation is an obligation on the Panel to consider applying its absolute discretion to select athletes whose performances are suitable. There is no obligation to select Athletes even where teams are not filled to the maximum allocated spots which was not the case here.
  56. In exercising its absolute discretion under clause 3.2.3 the Panel considered each of the matters under clauses 3.2.3.1 to 3.2.3.6 (as were available to it)
  57. There is no evidence of “actual bias” as alleged by the Applicant. Actual bias only exists where the decision-maker has pre-judged the case against the athlete, or acted with such partisanship or hostility as to show that the decision-maker had a mind made up against the athlete and was not open to persuasion in favour of the athlete. Where a selection panel is involved, even to demonstrate that an individual selector was or may have been actually biased may not suffice if it can be shown that the panel's decision, looked at on an overall basis, was a fair one. The Respondent submitted that the decision vis-à-vis the Applicant was a fair one.
  58. The Respondent's Selection Panel:
    - a) reached its decision honestly without bias and not under any capricious policy
    - b) reached a selection decision that could be reached by a selection committee acting both honestly, reasonably and without bias. It was not an unreasonable selection decision and was made reasonably on the material before it (*Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 per North J at 134 2 *Modahl v British Athletic Federation Limited* (2002) 1 WLR 1192 at 1213-1214)
    - c) is an expert sporting body which was entitled to bring its own knowledge, experience, and expertise to bear in its deliberations.
  59. The Applicant's request that the matter be determined by the Tribunal is inappropriate. If the Tribunal upholds the appeal, the Respondent submitted that the matter should be remitted to the Selection Panel with such directions as the Tribunal considers necessary.
  60. If an Athlete lodges a new appeal based on any “new” decision that matter would be dealt with as appropriate.
  61. The Respondent reserved its rights in respect to submissions on costs if ongoing appeals are made simply on the basis that an athlete thinks they should be selected.
  62. The Selection Panel is an expert panel and should make any new decision. The Tribunal should not assume a function which it is not designed for. The Courts have long recognised that they do not possess necessarily the expertise to tinker with decisions made by sporting bodies and have declared that they will do so only on a strictly limited basis. The Respondent referred

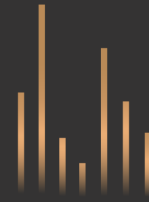


to the general approach of the Courts in this area as summarised by Tadgell JA in *Australian Football League v Carlton Football Club Limited* [1998] 2 VR 546 at 549 – 550.

63. The Respondent further submitted that as the decision of the Selection Panel was not unreasonable, there is no reason why the Tribunal should step into the shoes of the Selection Panel if the Tribunal upholds the appeal.

## MERITS

64. The Tribunal considered the Applicant's appeal against his non-selection for the 2022 Australian Canoe Slalom Team U23 K1M, on the grounds proposed that:
- a) Paddle Australia had failed to apply discretionary allowances equally to all U23 athletes and that this had resulted in selectors exhibiting an "actual bias" in their allocation of team positions; and
  - b) Paddle Australia had failed to follow guidelines set under Section 1 of the "Paddle Australia Selection procedure policy" to apply fair, consistent and transparent procedures and criteria in their use of discretionary allowances for selection of athletes on to the U23 team, who did not meet the Minimum Performance Standard required for Automatic Selection.
65. The question of "actual bias" was addressed during the hearing by the Chair, who explained, on behalf of the Tribunal, that "actual bias" requires a substantial amount of evidence to sustain the argument that actual bias exists, compared with apprehended bias. Ms Nicholls who was representing the Applicant, accepted this and understood the need for such evidence and withdrew this argument as she stated there was "no more she can provide" to the Tribunal.
66. Notwithstanding the Applicant's purported withdrawal of this ground of appeal, we find, for the abundance of caution, that on the totality of the evidence before the Tribunal that the Applicant has failed to establish, to the requisite standard, "actual bias" by the Selection Panel when making its decision not to select the Applicant. A party seeking to establish actual bias bears a heavy onus: *South Western Sydney Area Health Service v Edmonds* (2007) 4 DDCR 421; [2007] NSWCA 16, McColl JA (Giles and Tobias JJA agreeing) at [97]; *500 Burwood Highway Pty Ltd v Australian Unity Ltd* [2012] VSC 596, Vickery J at [174]. Actual bias is subject to a "stringent standard of proof" and will only be upheld "where the accusations are distinctly made and clearly proved" and where the accusation of bias is "firmly established": *Minister for Immigration & Multicultural Affairs v Jia* (2001) 205 CLR 507; 75 ALJR 679; [2001] HCA 17, Kirby J at [127]; *VFAB v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 131 FCR 102; [2003] FCA 872, Kenny J at [19]. An allegation of actual bias is serious and a finding of actual bias should only be made if the tribunal felt "an actual persuasion" as to the existence of bias, having regard to the seriousness of the allegation made, in accordance with the principle in *Briginshaw v Briginshaw* (1938) 60 CLR 336, Dixon J at 361–362: see also *Spirits International BV v Federal Treasury Enterprise (FKP) Sojuzplodoimport* [2013] FCAFC 106, Jacobson and Jessup JJ at [20].
67. None of the matters advanced by the Applicant in any of his written submissions or in his oral address before the Tribunal could amount to evidence of "actual" bias. The matters raised by



the Applicant in support of this ground of appeal, in our opinion, rose no higher than mere supposition, conjecture or assertion. There was no clear and compelling evidence placed before the Tribunal that the Selection Panel had prejudged the Applicant's selection in some way or that the Selection Panel did not bring an impartial mind to the resolution of the question that it was required to decide. Having examined the Selection Panel's decision closely and undertaken an assessment of its state of mind by reference to the evidence before it we have come to the conclusion that the decision of the Selection Panel was not affected by actual bias.

68. With respect to the question of whether or not the Respondent failed to follow fair, consistent and transparent procedures and criteria in selecting athletes for the U23 Team, Ms Nicholls relied upon the selection of the athlete, Sophie Wilson, on the basis of discretionary selection criteria for a team position (i.e. the Senior Team), having achieved Automatic Selection for another team (the U23 WK1).
69. The case advanced on behalf of the Applicant was that, in essence, selection criteria include reference to ranking of athletes using a percentage of an athlete's performance result against the benchmark result nominated by Paddle Australia as a Minimum Performance Standard (MPS).
70. The Applicant argued that Sophie Wilson had been selected for an event on discretionary criteria including a performance "4.95% off the U21 MPS", while the Applicant had achieved a performance at "2.83% off U23 K1M MPS".
71. The Applicant also referred to the different rankings within the events competed in by Sophie Wilson and by the Applicant and submitted that such rankings should give the Applicant some preferred consideration, given that Sophie Wilson had been appointed to a more senior level of competition.
72. Ms Natoli from the Respondent's Selection Panel explained that percentages for men and women in slalom canoe cannot be compared, as the percentages embrace different numbers of men and women in their respective competition groups. This, in effect, allows only for men's and women's performances to be compared with their male and female competitors.
73. The question of Sophie Wilson's eligibility for selection was not relevant to the determination of this appeal and, therefore, it was not a matter for consideration by the Tribunal.
74. On specific questioning of the Respondent's CEO, Mr Phil Jones, he stated quite clearly that there was no obligation on the Respondent to fill all positions available at all events.
75. Ms Nicholls acknowledged that the Respondent could exercise its discretion at all times over selections and accepted that all possible positions on all teams need not be filled.
76. The Tribunal is of the opinion that the Respondent had not failed to follow fair, consistent and transparent procedures and criteria in selecting athletes for the U23 Team.
77. The Applicant also submitted he had been disadvantaged by Covid lockdowns in Victoria, where he was residing and training, and that limited access to training after his move to train at Penrith was a factor in his performance at selection events. While the Tribunal accepts this may be correct access to training and coaching during a pandemic was (and is) a matter for the Respondent to best assess and not for the Tribunal.





78. With respect to the agreement reached in a previous mediation in the NST (reference NST-E21-41538) that “Ryan will be categorised as “Emerging” in the next round (of) categorisation which is equivalent categorisation to other junior team members”, Ms Nicholls accepted that the Respondent had re-categorised the Applicant.
79. However, Ms Nicholls proposed that this categorisation left the Applicant at a disadvantage compared with other K1M Junior athletes, as his access to training and coaching at Penrith National Centre of Excellence (NCE) was limited because other junior athletes were categorised as “Developing”.
80. The Tribunal is of the opinion that Paddle Australia had fulfilled its obligation, and the question of re-categorisation is a matter for Paddle Australia and not one that is open to the Tribunal to disturb.
81. In summary, the Selection Panel had an unfettered discretion in making its decisions under clause 3.2.3 of the Criteria. There was no obligation to select Athletes even where teams had not been filled to the maximum allocated spots. In our opinion, there was no evidence before the Tribunal that when the Selection Panel exercised its absolute discretion to not select the Applicant that it did so unreasonably, arbitrarily, capriciously or in bad faith. In our opinion, it was not an unreasonable selection decision and was made reasonably on the material before it.

**THE TRIBUNAL THEREFORE DETERMINES:**

- a) The Appeal against non-selection of Mr Ryan Hughes to 2022 Australian U23 K1M Team is dismissed.
- b) The matter of categorisation of athletes is strictly for the sporting body.

Date: 03 May 2022



Mr Adam Casselden SC



Ms Eugenie Buckley



Dr Peter Fricker