

Case number: NST-E23-97851

Case Title: Georgina Collin v Paddle Australia

## Determination

### National Sports Tribunal

#### General Division

sitting in the following composition:

Panel Member

Ms Venetia Bennett

in the arbitration between

**Georgina Collin**

*(Applicant)*

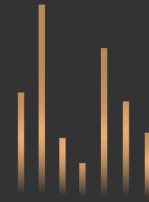
Represented by Mr Jeremy Masters of Counsel, instructed by Ms Alexandria Anthony, legal representative

And

**Paddle Australia**

*(Respondent)*

Represented by Mr Ian Fullagar, legal representative



## PARTIES

1. The Applicant is a 26 year old Australian competitor in the sport discipline of canoe slalom.
2. The Respondent 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 Selection Policy”) and Selection Criteria Supplement for Canoe Slalom (“the Criteria”), and for implementing that Selection Policy and those Criteria.

## INTRODUCTION

3. The Applicant appeals the Respondent’s decision to not select her to replace a withdrawn position in the Women’s K1 class at the 2023 Canoe Slalom Senior World Cup Events 1, 2 and 5.

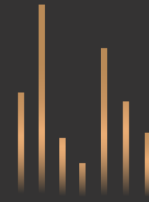
## NST JURISDICTION

4. The NST has jurisdiction under section 23 of the *National Sports Tribunal Act (Cth) 2019* (“NST Act”) and clause 9 of the Selection Policy to determine this dispute.
5. Clause 9.1 of the Selection Policy provides:

*An Athlete is only entitled to appeal against non-selection in respect of a team being selected to participate in an ICF competition. Such appeals against non-selection will be made to the NST and will be determined in accordance with the process detailed in this clause 9.*
6. Relevantly, clause 9.3.5 provides that “[t]he decision of the NST will be final and binding on the parties”.
7. Neither party objected to the NST’s jurisdiction to hear and determine the dispute.

## FACTUAL BACKGROUND

8. The Applicant seeks to represent Australia in the sport of canoe slalom in Women’s K1 events. She nominated for selection in the 2023 Canoe Slalom World Cup (“2023 World Cup”).
9. On 11 to 12 and 17 to 19 February 2023, the Applicant took part in selection competition events in Penrith (known as the Penrith Open and Australian Open), as required by the Selection Policy and the Criteria.
10. The Applicant finished 4<sup>th</sup> overall in the selection competition events. The athletes who placed 1<sup>st</sup> to 3<sup>rd</sup> were selected to fill quota-positions for the 2023 World Cup events. Having placed 4<sup>th</sup>, the Applicant was eligible for selection as a Reserve, at the discretion of the Respondent.
11. The Applicant was not selected as a Reserve for any 2023 World Cup events. She did not challenge this decision by the Respondent.
12. On about 22 February 2023, the Applicant was informed that a selected athlete for the Women’s K1 discipline had withdrawn from 2023 World Cup Events 1, 2 and 5 (“Relevant WC



Events”). The Applicant asked the Respondent whether, as the 4<sup>th</sup> placed competitor at the selection competition events, she would be selected to replace the withdrawn athlete.

13. On 10 April 2023 the Respondent confirmed to the Applicant that she would not be selected to replace the withdrawn athlete for the Relevant WC Events.<sup>1</sup>

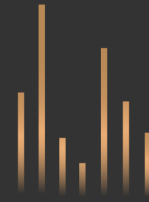
#### PROCEEDINGS BEFORE THE NST

14. The Applicant gave notice to the Respondent on 10 April 2023 that she was appealing the decision to not select her to replace the withdrawn athlete<sup>2</sup> for the WC Events (1 and 2), and on 17 April 2023 the Applicant filed an application to appeal the Respondent’s decision. In her Application Form, the Applicant requested that the case be resolved “as soon as possible” in view of the scheduled WC Events on 1 June and 8 June 2023.
15. The Applicant initially appealed the Respondent’s decision on two bases:
  - a. the Criteria had not been properly followed and/or implemented; and
  - b. the selection decision was affected by actual bias.
16. The NST held a Preliminary Conference on 20 April 2023, at which directions were made for the parties to file evidence and submissions.
17. The parties signed an Arbitration Agreement on 27 and 28 April 2023. In line with clause 9.1 of the Selection Policy, the Arbitration Agreement provided that the NST’s determination would be final and binding on the parties.
18. The CEO of the NST appointed Venetia Bennett as the Tribunal Member to hear the dispute. No party objected to the composition of the tribunal.
19. The parties each filed written submissions and documentary evidence, including witness statements given by the Applicant and Ms Crane of the Respondent (amongst others).
20. The hearing was conducted by videoconference on 4 May 2023.
21. At the outset of the hearing, the Applicant confirmed that she would not press the second ground of her appeal – that the selection decision was affected by actual bias (although she did not concede the issue).
22. At the conclusion of the hearing, the parties confirmed that their procedural rights had been fully respected.
23. The Tribunal delivered its determination on 4 May 2023, and the parties were advised that written reasons would follow at a later date.

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<sup>1</sup> The Tribunal notes that the Respondent used the term “Reserve” in communicating its decision, but in effect, meant “replacement”.

<sup>2</sup> Similarly to the Respondent, the Applicant used the term “name a reserve” to describe the decision that she intended to appeal. It is not in dispute between the parties that both the Respondent and Applicant meant “replacement”.



## APPLICABLE RULES

24. The relevant provisions of the Selection Policy and Criteria relate to the replacement of withdrawn Athletes previously selected to compete in an event. These are extracted below.
25. The relevant provisions of the Selection Policy are:

### *Introduction*

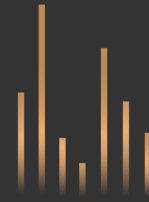
*The purpose of this Policy, including the relevant Selection Criteria Supplement, is to provide certainty and clarity to athletes seeking to be selected to PA Teams and to attend ICF and other international competitions in all Disciplines by establishing transparent and consistent procedures and criteria.*

*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.*

- 4.8 *Subject to this Policy, including the Selection Criteria Supplement, the Selection Panel has absolute discretion to determine whether an Athlete is selected in a Team.*
- 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.*
- 11.5 *A selected Athlete may withdraw their selection by giving notice in writing*
  - (i) for Teams in the Olympic/Paralympic Disciplines, to the NPD.*

...
- 11.7 *Where an Athlete/Crew has been selected to the Team and subsequently withdraws from or is unable to take part in a Team due to injury or illness, the Selection Panel may select a replacement.*
- 11.8 *In exercising their discretion, the Selection Panel may consider any factor, or combination of factors that is, in the opinion of the Selection Panel, relevant for consideration when selecting a replacement. Without in any way limiting the discretion of the Selection Panel as set out in this clause, the Selection Panel may consider the following:*

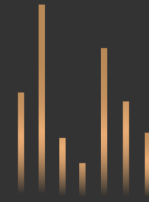


- (i) *relevant criteria within the Selection Criteria Supplement that relates to the selection of reserve Athletes;*
  - (ii) *performances in Selection Competitions;*
  - (iii) *performances in the previous World Championships and/or World Cups;*
  - (iv) *overall consistency of performance at an international level;*
  - (v) *individual strengths that may contribute to the performance of the Team as a whole;*
  - (vi) *willingness and ability to fill and/or complete a role that may enhance Australia's medal potential; or*
  - (vii) *the benefit of exposure to international racing to any Athlete who, in the opinion of the Selection Panel, has the potential to represent Australia in the future.*
- 26. The Applicant submitted and the Respondent concurred that clause 11.7 of the Selection Policy can only apply where there is no Reserve named for an Event or the Reserve is not available, as was the case for the Relevant WC Events. The parties agreed that the relevant decision was made under clause 11.7 of the Selection Policy.
- 27. Under clause 9.2 of the Selection Policy, a selection decision may only be appealed on the following grounds:
  - a. the applicable Selection Criteria Supplement has not been properly followed and/or implemented; or
  - b. the selection decision was affected by actual bias; or
  - c. there was no material on which the selection decision could reasonably be based.
- 28. As noted above, the Applicant advanced her appeal in relation only on the basis that the Criteria had not been properly followed and/or implemented (clause 9.2.1 of the Selection Policy).
- 29. The relevant provisions of the Criteria are:
  - 2. *To give context to the following policy and processes, the aims of the PA High Performance Program for the 2023 season are to:*
    - a) *Identify the top 3 senior athletes within each Event to contest the ICF Canoe Slalom World Cup and World Championship Events in 2023*
    - b) *Qualify Olympic quota places for Australia through the Olympic Qualification Event*
    - c) *Provide potential LA 2028 & Paris 2024 athletes, who reach the necessary age-related minimum performance standards, an opportunity to compete in ICF International competitions (if maximum number of ICF quota positions are not filled).*

#### DISCRETIONARY SELECTION

*The Selection Panel may consider where teams are not filled to the maximum allocated spots, applying its absolute discretion to select athletes whose performances are suitable for international representation.*

*4.2.7 The Selection Panel, at its absolute discretion, may select additional athletes in Olympic Canoe Slalom Events up to the maximum number of quota places awarded to Australia*



by the ICF. In doing so, it may consider any, or all or none of the following in no particular order:

- 4.2.7.1 ranking of each athlete according to clause 4.1.5 of this Criteria
- 4.2.7.2 application of Senior MPS according to clause 5 of this Criteria
- 4.2.7.3 performances in relation to the Senior MPS, or in relation to the U25 and U23 MPS for those U25 and U23 aged athletes, respectively
- 4.2.7.4 in accordance with clause 7.5 (i) to (vi) inclusive, of this Criteria
- 4.2.7.5 approved extenuating circumstances that may apply as outlined in clause 6, in which case a selection decision will be based on the weight of performance based evidence in accordance with clause 7.5 (i) to (vi) inclusive, of this Criteria
- 4.2.7.6 In the application of Discretionary Selection, the Selection Panel, at their absolute discretion, may select athlete(s) for one, or more than one, ICF World Cup Competition (including World Championships). In doing so, it may select additional athletes under the Reserve Criteria (Clause 4.3), to fill any quota places awarded to Australia by the ICF.

#### 4.3 Reserves

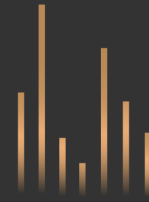
*The Selection Panel may, but is not obliged to, name Reserves for each Event and competition. The Selection Panel may at its sole discretion, select the same, or different athletes for a reserve position for each Event and competition outlined by this Criteria.*

...

*All decisions made by the Selection Panel in the process of selecting reserves for Events and competitions, will be made according to clause 4.2.7 (Discretionary Selection). If a selected Athlete chooses not to or is unable to compete in any of the selected competitions, then the Reserve athlete will replace the selected Athlete in that competition.*

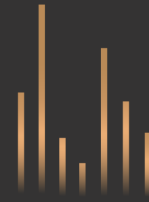
### MAIN SUBMISSIONS OF THE PARTIES

30. While the Tribunal has considered all the facts, allegations, legal arguments and evidence submitted by the parties, it refers in this Determination only to the submissions and evidence it considers necessary to explain its reasoning.
31. Whilst acknowledging the words “absolute discretion”, the Applicant submitted that the proper construction of clauses 11.7 and 11.8 of the Selection Policy required the Selection Panel to exercise its discretion having regard to all relevant matters relating to selecting a replacement athlete. The Applicant says that the Selection Panel’s discretion was not so broad that it was able to decide to not consider any relevant matters at all.
32. The Applicant submitted that, in making its decision whether to name an athlete to replace the withdrawn athlete at the Relevant WC Events, the Selection Panel should have had (but did not have) regard to the matters listed in clause 11.8 of the Selection Policy, particularly clause 11.8(i) – the relevant criteria within the Criteria, in this case, being clauses 4.3 and 4.2.7. The Applicant does not assert that the Selection Panel ought to have considered each of the matters referred to in clause 11.8 of the Selection Policy (or to each of the matters referred to in



- clause 4.2.7 of the Criteria), but submits that it ought to have considered all matters listed within that clause that were relevant to its decision, which in this case, included the matters within clause 4.2.7 of the Criteria.
33. The Applicant submitted that the Respondent did not consider relevant matters relating to her selection as a replacement that would have arisen if the Selection Panel had turned its mind to the matters listed in clause 4.2.7 of the Criteria. These matters included her ranking and performance to MPS from the results she obtained at the Penrith Open and Australian Open and recent competitions in Europe, as well as her relative improvement from 2022, and over the period between 2018 to 2021. Further, the Applicant submits that the Selection Panel did not consider the Applicant's individual strengths that may contribute to the performance of the Team as a whole, her willingness and ability to fill a role that may enhance Australia's medal potential, or the benefit of exposure to international racing for the Applicant (who says that she has potential to represent Australia in the future).
  34. For the above reasons, the Applicant's position was that the Respondent did not properly follow and/or implement the Criteria.
  35. The Respondent submitted that its Selection Panel's discretion was absolute, and that the Selection Panel was not required to consider any or all of the matters referred to in clause 4.2.7 of the Criteria, nor was it obliged to consider any of the factors listed in clause 11.8 of the Selection Policy.
  36. The resolution of this appeal therefore depends on the proper construction of the Selection Policy and Criteria, and particularly the extent of the Selection Panel's discretion in making a decision pursuant to clause 11.7.
  37. The Respondent submitted that, in making its decision under clause 11.7, the Selection Panel acted in good faith and in accordance with the Criteria, and denied that it exercised its discretion in an arbitrary or capricious manner. It says that the Selection Panel exercised its discretion in accordance with the purposes, objectives and selection aims of the Selection Policy and Criteria. The Respondent also submitted that the Applicant's ranking and performance to MPS were considered by the Selection Panel when it made its decision in February/March 2023 to not name the Applicant as a Reserve; that is, the Selection Panel – which was comprised of highly experienced selectors – was already aware of these matters when the Panel subsequently decided to not name the Applicant as a replacement for the withdrawn athlete in April 2023.
  38. In the event that the Tribunal allowed the appeal, the Respondent requested that the decision be remitted to the Selection Panel, with direction as to the matters that it should consider.
  39. As a peripheral issue to the Applicant's main submissions, there was some conjecture regarding the applicable version of the Criteria, on the basis that a key metric (the Minimum Performance Standards / "MPS") could be calculated in a manner more favourable for the Applicant if the earlier version of the Criteria was interpreted in a particular way. Ultimately, however, the calculation of the Applicant's MPS did not affect her ranking at the Penrith selection competition events, and on the evidence before the Tribunal, it appears to have had little, if any, bearing on the Respondent's decision in early April 2023.





40. In addition, there is a broad power under clause 3.2 of the Selection Policy that allows the Respondent to amend (or repeal) the Criteria “at any time” for any one or more of listed reasons, including “to give effect to the Criteria following discovery of a drafting error or oversight” or “to clarify any ambiguity or otherwise give effect to the intended meaning of the Criteria Supplement”. The Tribunal accepts that the Criteria was properly amended by the Respondent.
41. The Tribunal communicated to the parties on 4 May 2023 that it considered that the revised version of the Criteria could apply to any decision by the Respondent.

## MERITS

42. It was common ground between the parties that the Selection Panel’s relevant decision in early April 2023 was made under clause 11.7 of the Selection Policy, and the Tribunal accepts this.
43. Clause 11.8 of the Selection Policy lists 7 factors that the Selection Panel may consider (in addition to any factors that it considers relevant) when selecting a replacement under clause 11.7. The first of these (clause 11.8(i)) refers to “Relevant criteria within the Selection Criteria Supplement that relates to the selection of reserve Athletes”. For the purpose of a decision under clause 11.7 of the Selection Policy, the relevant criteria are found in clauses 4.3 and 4.2.7 of the Criteria.
44. The Tribunal acknowledges that the factors in clause 11.8 of the Selection Policy are listed “without in any way limiting the discretion of the Selection Panel”, and that the Selection Panel’s discretion under clause 4.2.7 of the Criteria and clause 4.8 of the Selection Policy is described as absolute. However, as this Tribunal said in *Hogan v Triathlon Australia* in relation to an absolute discretion for selection in the sport of Triathlon:<sup>3</sup>

*Whilst the discretion reserved to TA is expressed to be absolute, it is informed to a considerable extent by the objective of the Selection Policy expressed in clause 1.2, the factors to which regard may be had as articulated in clause 4.3.1, and the results from events undertaken in the previous 12 months set out in clause 5.1.*

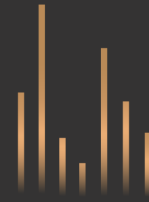
*Whilst most selection policies are expressed to reserve to the selection body, a discretion in absolute terms, it is also usually the case, such as with TA in this case, that the relevant policy prescribes a principal objective to be achieved by the selection process and factors to which regard may be had in considering the exercise of discretion. Discretions must always be exercised reasonably and not capriciously. Prescribed criteria are important to regulate the proper exercise of discretion. The less the discretion exercised had regard to the prescribed criteria, the more difficult it will be to justify such a selection and the more open to challenge it will be.*

45. The same can be said in relation to the Paddle Australia Selection Policy. The Selection Panel’s “absolute” discretion is to be informed to a considerable extent by the objectives expressed in the Introduction to the Selection Policy and aims expressed in clause 2 of the Criteria, as well as the factors to which the Selection Panel may have had regard as articulated

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<sup>3</sup> *Hogan v Triathlon Australia* (NST-E23-47455) at [36]-[37].

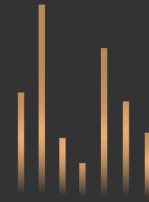




- in clause 11.8 of the Selection Policy (and, by reference in clause 11.8(i), clause 4.2.7 of the Criteria).
46. In exercising its discretion, the Selection Panel should consider matters that are relevant to the decision before it. Relevant matters in a decision made under clause 11.7 of the Selection Policy will be framed by (but not limited to) the matters referred to in clause 11.8 of the Selection Policy (and clause 4.2.7 of the Criteria), as well as by the objective and aims of the Selection Policy and Criteria. It is trite to note that some of the matters referred to in clause 11.8 may not be relevant to each case before the Panel. It should, however, turn its mind to those matters that are relevant. In adopting this approach, the Selection Panel is less likely to make a decision that does not adhere to the Selection Policy and Criteria.
  47. Further, the Tribunal accepts the Applicant's submission that a contractual discretion (which is, in effect, what is provided in the Selection Policy) must be exercised in good faith and in accordance with the terms of the parties' agreement,<sup>4</sup> and in a manner that is not unreasonable, arbitrary or capricious.<sup>5</sup>
  48. As the decision whether to name the Applicant as a replacement for the withdrawn athlete was a separate decision to the Selection Panel's decision in February/March 2023 to not name the Applicant as a Reserve, the Selection Panel was required to consider matters relevant to that particular decision at the time that it made its decision.
  49. The relevant matters for the Selection Panel to have considered are not limited to the matters set out in clause 11.8 of the Selection Policy and clause 4.2.7 of the Criteria (and may also include, for example, other matters that were referred to in the Respondent's evidence such as the Respondent's financial circumstances and the timing within an Olympic cycle). However, the Selection Panel should at least turn its mind to the relevant provisions of the Selection Policy and applicable Selection Criteria Supplement (in this case, clause 11.8 of the Selection Policy and clause 4.2.7 of the Criteria), and where the matters referred to in the Selection Policy and Criteria are relevant to the decision being made, these should be considered by the Selection Panel.
  50. In the decision before the Selection Panel regarding whether to name the Applicant as a replacement for the withdrawn athlete, the matters noted in clause 4.2.7 of the Criteria were clearly relevant to the Selection Panel's decision.
  51. There was no evidence before the Tribunal that the Selection Panel considered clause 4.2.7 of the Criteria (and the factors listed therein) in making its decision whether to replace the withdrawn athlete. In particular, there was no evidence that the Selection Panel considered the Applicant's ranking and performance against MPS in 2023 in making its decision.
  52. That evidence, had it been available, would have been held by the Respondent, and the Respondent could have arranged for this evidence to be given. The fact that it did not do so allows the Tribunal to reasonably conclude that the Respondent did not consider clause 4.2.7 of the Criteria in reaching its decision not to replace the withdrawn athlete with the Applicant.

<sup>4</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199 at 273 [288], citing *Renard Constructions (ME) Pty Ltd v Minister for Public Work* (1992) 26 NSWLR 234.

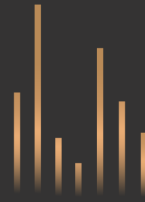
<sup>5</sup> *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357 at [5]-[6].



53. Instead, the evidence before the Tribunal (see pages 100 to 128 of the Hearing Book) is that the focus of the Selection Panel was on the matters set out in clause 11.8 of the Selection Policy, other than clause 11.8(i).
54. On the balance of probabilities, the Tribunal therefore finds that the Respondent did not consider the matters specified in clause 4.2.7 of the Criteria in its decision to not replace the withdrawn athlete with the Applicant.
55. In view of the decision before the Selection Panel and clause 11.8(i) of the Selection Policy, the matters in clause 4.2.7 of the Criteria were relevant matters for the Selection Panel to consider in deciding whether to replace the withdrawn athlete, and it ought to have done so. Having failed to consider clause 4.2.7 of the Criteria, as contemplated by clause 9.2.2 of the Selection Policy, the Selection Panel failed to properly follow and/or implement the Selection Criteria Supplement.
56. The Applicant's appeal is therefore allowed.
57. For the sake of completeness, whilst finding that the Selection Panel failed to properly follow and/or implement the Criteria, the Tribunal does not find that the Selection Panel's decision was made with bad faith, or that it was an, unreasonable, arbitrary or capricious decision.
58. The Tribunal lacks the relevant expertise to decide whether to replace the withdrawn athlete for the Relevant WC Events (and whether, if a replacement athlete is to be named, that athlete should be the Applicant). The decision should therefore be remitted for decision by the Paddle Australia Selection Panel.
59. In reaching the above decision, the Tribunal notes that it does not suggest that the Selection Panel is required to, or that it should, reach a different decision to the decision that it made in April 2023. It may well be the case that, having properly followed and/or implemented the Criteria (and in doing so, considered clause 11.8 of the Selection Policy and clauses 4.3 and 4.2.7 of the Criteria), the Selection Panel reaches the same decision to not select a replacement for the Relevant WC Events – whether the Applicant or any other Athlete.
60. The Tribunal confirms that the Selection Panel's decision made in accordance with this Determination will be a decision under the Selection Policy, and as such will be subject to clause 9 of the Selection Policy.

**THE TRIBUNAL THEREFORE DETERMINES:**

1. *The Applicant's selection appeal is allowed.*
2. *The decision whether to select a replacement for Ms Kate Eckhardt for World Cup events 1, 2 and 5 (pursuant to clause 11.7 of the Paddle Australia Selection Procedures Policy) is remitted to the Respondent for decision by its Selection Panel.*
3. *The Tribunal directs the Respondent to require its Selection Panel to:*



- a. *Make its decision under clause 11.7 of the Selection Procedures Policy by 9 May 2023, so that it can communicate its decision to the Applicant by the same date; and*
- b. *Consider clause 11.8 of the Selection Procedures Policy and clauses 4.3 and 4.2.7 of the Selection Criteria Supplement in making its decision under clause 11.7 of the Selection Procedures Policy.*

Date: 1 June 2023 (decision given 4 May 2023)



Ms Venetia Bennett