

Case number: NST-E23-106167

Case Title: Kelly Mann v Australian Powerlifting Union

Determination

National Sports Tribunal General Division

sitting in the following composition:

Panel Member

Mr Ian White

in the arbitration between

Kelly Mann

(Applicant)

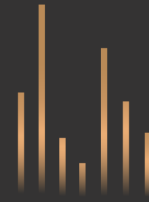
Represented by Simon Grant, legal representative

And

Australian Powerlifting Union

(Respondent)

Represented by Stephen Free, legal representative



PARTIES

1. Ms Kelly Mann (the 'Applicant') is an accredited exercise physiologist¹ and Powerlifting coach who owns and operates a gymnasium in Bowen Hills, Brisbane called PerforMotion. She is a coach of approximately 60 powerlifting athletes from Australia and internationally. She has been a member of the Australian Powerlifting community for more than 10 years both as a former powerlifter and now as coach. She is also a member of the Australian Powerlifting Union (APU), the respondent in this arbitration.
2. She employs 13 people at PerforMotion, three exercise physiologists, seven performance coaches and three administrative staff.
3. **APU**
The APU was established after a tumultuous period of powerlifting in Australia in the preceding years.
4. The APU is an incorporated body. It has a constitution, by laws, regulations and policies which provide for disciplinary action and/or measures to be taken concerning any alleged or proven misbehaviour or conduct by a member. Its stated values and commitment are to provide and enforce respectful behaviour, integrity and inclusiveness.³
5. The APU is recognised by the International Powerlifting Federation⁴ and is a full member. The APU is WADA compliant.

INTRODUCTION

6. On the weekend of 28 and 29 January 2023, APU organised a Level 1 coaching course. It was held at the Empire Body Shop in Beenleigh, approximately 35km south of Brisbane. The course was attended by many members of the APU, in particular powerlifting club coaches.
7. The Applicant together with other members of PerforMotion, attended the two day course. Unfortunately, there was disquiet amongst attendees about what was alleged to have been disrespectful behaviour by the PerforMotion attendees including the Applicant. In the days following the course, APU received formal complaints from attendees via email as follows, namely:
 - i) On Tuesday 31 January 2023 at 9:52am, Ms Emma Smith, lead coach and owner of the Empire Body Shop.⁵
 - ii) On Tuesday 31 January 2023 at 2:45pm, from Allison Elcoate.

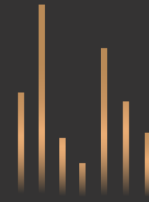
¹ AEP

² [redacted]

³ AB 201 (summary of APU values)

⁴ IPF

⁵ AB 316-318



- iii) On Wednesday 1 February 2023 at 4:53am, Mr Shannan Burns from the Police – Citizens Youth Clubs (PCYC).⁶

8. **Topics raised in complaints**

There are a number of topics in the complaints that can be generally described as ‘*disrespectful behaviour*’. These complaints included allegations of:

- i) Excessive use of mobile phones instead of concentrating on the content of presentations.
- ii) Loud conversations amongst PerforMotion attendees that were disruptive to presentations.
- iii) An obvious lack of contribution to the various segments of the course.
- iv) A separate issue of a remark by the Applicant concerning a rival powerlifting association within Australia called the USAPL (USA Powerlifting).

9. **APU’s reaction to complaints**

In general the reaction of the APU to the complaints was as follows, namely to:

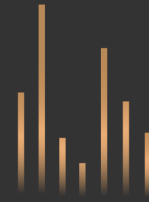
- i) Acknowledge each complaint with a promise to consider the matters raised.
 - ii) Raise the complaints in a general sense with the Applicant on 5 February 2023 by requesting her ‘*attendance to an upcoming Zoom meeting to discuss feedback APU received about few incidents that occurred during recent APU Level 1 coaching course... Your attendance at this meeting is mandatory and should you be unable to attend, please contact me as soon as possible*’.⁷ A date of 16 February 2023 was set at 7pm Brisbane time.
- 10. No particulars of the complaints set out above were provided to the Applicant before she attended this Zoom meeting. Two of her colleagues from PerforMotion also attended. It lasted approximately 40 minutes.⁸
 - 11. At this Zoom meeting the Applicant made a general apology concerning her conduct stating that she ‘*should have stopped a lot of the behaviour, but I didn’t... myself personally, I’m ashamed, ...that members of my team would act this way*’.⁹ The Applicant is identified as Speaker 3 in the transcript.
 - 12. Apologies were also made by other members of PerforMotion that were present concerning their respective personal behaviour on the course.
 - 13. These apologies were acknowledged as being gratefully received by the APU executive and in particular Mr Muir.
 - 14. By letter dated 15 March 2023 emailed to the Applicant, APU imposed the following sanctions upon her, namely:

⁶ AB 322

⁷ AB 174. See transcript of email from Ms Adelaide Chang, APU Secretary General.

⁸ See transcript at AB 270-288. Video and transcript of meeting was provided to the NST.

⁹ AB 274. Initial comments of Ms Mann at the Zoom meeting



- i) A request for a written public apology on behalf of PerforMotion to the attendees of the coaching course in January 2023.
 - ii) That her membership at APU valid until 26 October 2023 '*will be monitored and a final decision would be taken depending on your behaviour in these months*'.¹⁰
 - iii) The Applicant's coaching licence remains valid until the end of her current membership period of 26 October 2023 but restricted to a '*maximum Level 2* for period of twelve (12) months starting the date of this letter*'.¹¹
15. The Applicant disputes the following matters, namely:
- i) That the APU have failed to establish that the Applicant's behaviour constituted a relevant breach of the APU's Code of Behaviour in the '*APU Member Protection Policy*'. In the alternative should APU have the power to impose sanctions in these circumstances, the Applicant's penalty was manifestly excessive.

NST JURISDICTION

16. Both the Applicant and APU agree that the jurisdiction of the NST is engaged in this matter by section 23(1)(a), 23(1)(b)(ii) and 23(1)(c)(i) of the National Sports Tribunal Act 2019 (NST Act).
17. As indicated by the arbitration agreement signed by both parties on 5 May 2023,¹² this matter was referred to the NST for arbitration.
18. The terms of the arbitration agreement, in particular a description of dispute and the main issues identified by the parties in Parts 5 and 6 set out the parameters of the Arbitration. This was further refined prior to the hearing conducted on Wednesday 17 May 2023 via Zoom. At a pre-trial directions hearing, it was agreed by the parties that no witnesses need be called and I could rely on the materials supplied.

FACTUAL BACKGROUND

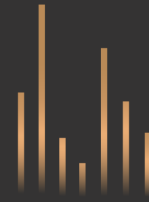
19. I have already given a relatively detailed background to this matter. However, some matters touched upon need further examination in particular, the reference by the Applicant to the USAPL and the significance, if any, of the Applicant's admission at the Zoom meeting concerning failing to deal with her colleagues that weekend together with her initial response to APU first raising these matters in general in February 2023.
20. **Applicant's response to disciplinary sanctions**
On 16 March 2023, the Applicant wrote to the APU. She sought particulars of her conduct that formed the basis of the sanctions. She informed APU that she had '*outlined numerous meetings and performance reviews...with PerforMotion staff who attended the coaching course...in addition to the support and facilitation of written apologies by staff*'. She stated she had '*demonstrated sincerity regarding the inaction of myself on the day and the actions of others, as well as the support and reprimanding of PerforMotion representatives as a result*'.¹³

¹⁰ AB 19

¹¹ AB 19

¹² AB 49-53

¹³ AB 363



21. On 18 March 2023, the Applicant indicated she would like to *'proceed with an appeal process to be conducted in writing please'*.¹⁴ She again apologised on behalf of herself and PerforMotion outlining that she *'sincerely apologized (sic) for a response I gave in answering a question that was put to me which I regret, and in hindsight should have explained more fully at the time. I did not intend that this response could be perceived as disrespectful or unsupportive'*.¹⁵
22. On 27 March 2023, the Applicant wrote to APU requesting the APU's constitution, policies and procedure documents including the APU Member Protection Policy (MPP).¹⁶
23. **USAPL issue and Applicant's remark**
The USAPL have recently extended its association to open and operate in Australia. In essence it is a rival association.
24. During the coaching course, an issue arose during a presentation by Mr Muir concerning the change to the IPF bench press rule regarding *'elbow depth'*¹⁷ and what strategies the attendees were proposing to do to assist their clients/athletes to meet that standard.
25. The admitted response of the Applicant to this general comment was *'we'll just all go the USAPL'*. Some of the attendees openly laughed whilst others were offended by this remark. The USAPL had not adopted the new IPF *'elbow depth'* rule.
26. This remark assumed great prominence in the interaction between APU and the Applicant after the course. It was also a prominent matter at the Arbitration.
27. During the Zoom meeting, the APU expressed they felt this remark was *'really unprofessional, inappropriate...disrespectful'*.¹⁸ The Applicant's initial response at that meeting was that remark had been *'misinterpreted'*.¹⁹ She further explained *'Sean asked me what, ...my lifter would do if they couldn't make the bench rules. And I was referring to American lifter when I said that, who I spoke to Sean about the next day. So I wasn't, no one should have laughed, and I was taken back when people laughed. And it wasn't meant in a laughing way and a laughing manner at all, because if...I was being honest...this lifter couldn't, who was actually a world champion, current world champion, she has no choice. And it's not because of anything APU's done or trying to disrespect APU I meant it honestly. And it really came across in a poor manner. And I think if we were talking face to face without everyone around, I would've explained myself'*.²⁰
28. The Applicant further stated that she approached Mr Muir the following day at the course acknowledging she *'should have just come clean and apologised straight away'*.²¹ She emphasised at the Zoom meeting that it wasn't meant to be a threat to leave.²² Finally she

¹⁴ AB 367

¹⁵ AB 368

¹⁶ MPP

¹⁷ AB 316

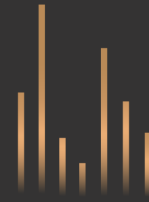
¹⁸ AB 272-273, Zoom transcript

¹⁹ AB 274

²⁰ AB 274-275

²¹ AB 275

²² AB 275



dealt with this issue by stating that she was *'happy to apologise to the people who were in the course, but I didn't mean it in a way to disrespect anybody'*.²³

29. On 17 February 2023, the day following the Zoom meeting, the Applicant sent an email to 'APU board members'. She raised the following matters, namely:
- i) Her thanks for *'holding such a professional discussion last night with the Performotion team'*.
 - ii) A further apology for the actions or words of *'both myself and my staff members'*, commenting that she was *'deeply ashamed, embarrassed and angry at the reputation of both Performotion and APU has been tarnished'*.
 - iii) A reiteration that she should have *'stepped in to stop'* the behaviour of her colleagues.
 - iv) A promise that this type of behaviour would not happen again by Performotion.
 - v) A further explanation that her comment regarding the USAPL was concerning *'an American lifter who is trying her very best to reach depth but feels unsuccessful. I should have rephrased and explained myself on the spot when the conversation occurred, as I can now see how it came across to those who are unaware of the lifter I was referring to'*.
 - vi) An offer for Performotion to suggest to her colleagues that attended the seminar that *'formal apologies be sent to each member of the APU who was at the course'*.²⁴
 - vii) An offer of rectification by proposing to hold a refereeing course or coaching course at Performotion as well as making contact with The Empire Body Shop.

PROCEEDINGS BEFORE THE NST

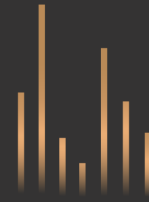
30. The proceedings were conducted before me on 17 May 2023 via Zoom. Mr Grant represented the Applicant and Mr Free SC represented the APU. Both counsel were extremely helpful and thorough in distilling the issues down to the following matters that the disciplinary action, if valid against the Applicant applied to the following two topics, namely:
- i) Her failure as leader of Performotion to act to cease or attempt to cease the overall disrespectful behaviour of her Performotion colleagues at the coaching course.
 - ii) The USAPL remark.

31. **Was there power to discipline the Applicant by APU for the two acts of misconduct particularised above**

I pause to comment at this point that the particulars of the alleged conduct were not made plain to the Applicant before the Zoom meeting. Nor were they articulated in the letter from APU on 15 March 2023 outlining the sanctions. It would have been preferable had allegations been clearly given to the Applicant at the earliest possible stage.

²³ AB 275

²⁴ AB 289



32. Having said that, the Applicant was aware of the generality of the allegation of disrespectful behaviour by PerforMotion, members at the seminar together with the objection taken by APU board and some of its members to the USAPL remark.
33. **Disciplinary powers by the APU**
Clauses 37 and 38 of the APU Constitution provide criteria and procedure for any disciplinary measures to be validated.
34. In essence I find that the procedure for this matter satisfied those requirements.
35. As outlined earlier on 5 February 2023, the Applicant was requested to be part of the Zoom meeting that occurred on 16 February 2023.²⁵ On 6 February 2023, APU determined that the issues from the coaching course should be directed towards all PerforMotion coaches who were present at the seminar.²⁶ A return email from the same day from the Applicant outlined that Ms Radke, Mr Day and the Applicant will attend the Zoom meeting as requested by Mr Muir.²⁷ A further email sent on the afternoon of 6 February 2023 by APU nominating that the 'feedback' from the course concerning the behaviours and actions of PerforMotion did not uphold the values of respect and support expected at APU and that these issues will be addressed at the Zoom meeting.²⁸
36. I am satisfied that although the particulars may have been supplied at the time of the request for attendance at the Zoom meeting, the APU have complied with the procedure under its Constitution²⁹ to set out to conduct a disciplinary matter against the Applicant.
37. **Was the Applicant liable to be disciplined under the MPP of the APU?**
This focused on whether it was proper for the Applicant to be disciplined for the words and actions of her colleagues at the course. In short I find it was a proper application of the MPP to allege blame against the Applicant for the behaviour of her employees/colleagues. The APU argued that the Applicant's behaviour breached various clauses of the MPP, namely:
- i) Part A, paragraph 2 – The purpose of the policy is to '*...ensure that every person involved in our sport is treated with respect and dignity and protected from discrimination, harassment and abuse. It also seeks to inform everyone involved in our sport of their legal and ethical rights and responsibilities, as well as the standards of behaviour expected*'.³⁰
 - ii) Part A, paragraph 3 – '*Club Affiliates are required to adopt and implement this policy*'.³¹
The APU alleged that the Applicant failed to adopt and implement the MPP concerning behaviour of PerforMotion at the course.
 - iii) Part A, paragraph 5.6 – This emphasises that individuals under the MPP must be '*accountable for their behaviour*'.³²

²⁵ AB 174

²⁶ AB 177

²⁷ AB 178

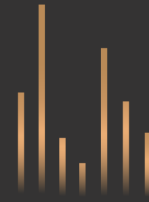
²⁸ AB 179

²⁹ Clauses 7 and 8

³⁰ AB 79

³¹ AB 79

³² AB 80



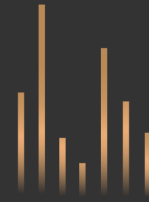
- iv) Part A, paragraph 6.3.2 – Harassment. The APU alleges that the behaviour of PerformMotion at the seminar could be classified as harassment as it was ‘*unwelcome conduct, that intimidates, offends or humiliates another person*’.³³
38. In light of these above matters, I find that the Applicant was properly liable if proven against her, for failure to quell the actions of her employees/colleagues. I note that she also made admissions against interest on this topic at the Zoom meeting and in the email to APU on 17 February 2023. I also find that it was proper for the APU to allege that the USAPL remark was contrary to the MPP policy.³⁴
39. Therefore, I accept the submissions of the APU and find that it was correct for them to allege the Applicant breached the MPP on the two topics as finally particularised.
40. **Was the sanction imposed on the Applicant within the powers of APU?**
Pursuant to paragraph 9 of the MPP, I find that the sanctions imposed by the APU were within power.
9. *Disciplinary measures*
If an individual or organisation to which this policy applies breaches this policy, one or more forms of discipline may be imposed. Any disciplinary measure imposed will be:
- *fair and reasonable;*
 - *applied consistent with any contractual and employment rules and requirements;*
 - *be based on the evidence and information presented and the seriousness of the breach; and*
 - *be determined in accordance with APU’s Constitution, by-laws, this Policy and/or the rules of the sport.*
41. **Was the punishment excessive and if so should it be removed or varied**
Under the MPP, the factors to consider in imposing punishment are set out clearly.³⁵ They include consideration of, (i) the nature and seriousness of the breach, (ii) the level of contrition shown by the offender, (iii) the effect of the proposed sanctions on the offender, (iv) any prior antecedents including warnings and/or disciplinary action and (v) any other further relevant mitigating circumstances.
42. In applying the sanction, the APU expressed to the Applicant that they took into account her ‘regret, apology and intention to not repeat the same behaviour in the future’.³⁶
43. I accept the Applicant showed contrition in the immediate aftermath of the course and in February and March 2023.
44. I do not hold it against her that she has exercised her rights to arbitrate this matter before the NST.
45. The Applicant argued that the sanctions concerning her restriction of going no further than a Level 2 coaching accreditation until 14 March 2024, on top of the other sanctions of a public apology to the attendees of the seminar was excessive.

³³ AB 82-83

³⁴ AB 74-120

³⁵ AP 89-91

³⁶ AB 184



46. The sanctions also warned that she is effectively subject to what I called a probationary period until the end of her current membership on 26 October 2023.
47. The APU submitted that the sanctions involved were mild and could not be said to be excessive.
48. I refer to the fact that the Applicant openly offered to apologise to attendees of the course at the Zoom meeting and in other correspondence in the aftermath of the seminar. The APU argued that the sanction of a public apology was no more and that she volunteered to do.
49. I was troubled by the utility of the restriction of her coaching accreditation to no more than Level 2 until 15 March 2024. I was told that it was academic in the sense that no Level 2 coaching courses had been organised and that if one is done in 2023 and early 2024 she is not barred from obtaining it. A Level 3 course has not been arranged by APU.
50. **Findings concerning sanctions imposed**
I find that the sanctions imposed were within the scope of power of the APU under its constitution and MPP. I have carefully considered the arguments of the Applicant together with the responses of APU concerning the severity of the sanctions and whether they should be varied or vacated.
51. I find that the sanctions imposed by the APU were not excessive in all the circumstances. I find the APU properly recognised and considered the Applicant's personal circumstances and contrite behaviour in deciding a penalty for her. The temporary Level 2 coaching restriction was justified on the basis of general deterrence to other APU members even though it is likely not to have a practical purpose.
52. I find that these sanctions in the end were reasonably imposed and therefore dismiss the Applicant's application to overturn them.

THE TRIBUNAL THEREFORE DETERMINES:

53. **Conclusions**
I find disciplinary action against the Applicant by APU was a valid exercise of power under APU constitution for breaches of APU Member Protection Policy.
54. I find the sanctions imposed on the Applicant are not manifestly excessive and should not be varied.
55. **Order**
1. The application to overturn the sanctions of the APU imposed on the Applicant by letter dated 15 March 2023, is dismissed.

Date: 5 June 2023 (decision given 19 May 2023)



Ian White