

Case number: NST-E23-141322

Case Title: Ari Gesini v Athletics Australia

## Determination

### National Sports Tribunal General Division

sitting in the following composition:

Panel Member

Ms Eugénie Buckley

in the arbitration between

**Ari Gesini**

*(Applicant)*

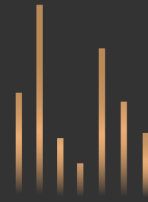
Represented by Mr John Purnell SC, legal representative

And

**Athletics Australia**

*(Respondent)*

Represented by Simon Thompson, National Integrity Manager



## PARTIES

1. Applicant is Ari Gesini, athlete, represented by Mr John Purnell SC, legal representative.
2. Respondent is Athletics Australia, National Sporting Organisation, represented by Simon Thompson, National Integrity Manager.

## INTRODUCTION

3. This matter was an appeal against Athletics Australia (**AA**) non-selection of the Applicant for nomination to the 2023 World Para Athletics Championships (**Competition**) in the Long Jump T38 (**Event**).
4. The main issues were whether AA erred in determining that Mr Gesini had not met the relevant criteria of the AA Selection Policy 2023 World Para Athletics Championships Paris, France 8 – 17 July 2023 (24 May 2023) (**Selection Policy**) and/or that AA failed to exercise its discretion in accordance with that Selection Policy.

## NST JURISDICTION

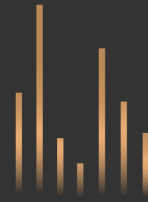
5. The jurisdiction of the NST is engaged by section 23 of the *National Sports Tribunal Act 2019* (**NST Act**) and AA By-Law and the Selection Policy.
6. AA referred the matter to the NST to be arbitrated under clause 6.5(1) of the AA By-Law.
7. AA By-Law and the Selection Policy provides that a Selection Appeals Tribunal shall be composed of three panel members with experience in Athletics and the law. Given the short timeframe in which this appeal is to be resolved, the NST Registry proposed in accordance with the NST Act, and the parties agreed, that the tribunal be composed of one independent panel member.

## FACTUAL BACKGROUND

8. The Respondent is the national governing body for Athletics in Australia. The Applicant is a member of the Respondent.
9. The dispute between the parties relates to AA's non-selection of Mr Gesini to compete in the upcoming Competition.
10. This matter was extremely urgent given the limited timeframe between the end of the appeal window (30 May 2023) and the Competition entry closing date (23:59 on 1 June 2023). Accordingly, the parties followed the 'Fast Track' procedure under Annexure 2: Appeals Process of the Selection Policy.
11. While the Tribunal has considered all the facts, allegations, legal arguments and evidence submitted by the parties, this Determination refers only to the submissions and evidence considered necessary to explain reasoning.

## PROCEEDINGS BEFORE THE NST

12. Mr Gesini lodged his Notice of Appeal with the NST Registry on 30 May 2023.
13. AA filed submissions with the NST Registry by 12:00pm AEST 31 May 2023.
14. Mr Gesini filed Amended Notice of Appeal at 2:15pm 31 May 2023 and submissions in reply to AA with the NST Registry by 5:00pm AEST 31 May 2023.



15. At the Applicant's request, the parties provided verbal submissions and the hearing took place virtually at 10am on 1 June 2023.
16. NST to provide its decision by 4:00pm AEST 1 June 2023.
17. 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

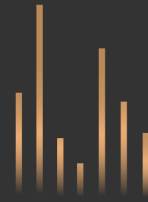
18. The arbitration was governed by the NST Act and conducted in accordance with the AA By-Laws and Selection Policy.
19. Appendix 2 to the Selection Policy establishes the Grounds for an Appeal:
  - 1.6 The sole grounds of appeal are that:
    - (a) a selected athlete whom the Appellant seeks to replace does not meet the Athlete Eligibility Criteria;
    - (b) the Appellant's omission from the Team was otherwise a result of a failure by the Selectors to properly apply the Selection Criteria set out in the Policy;
    - (c) there were no grounds on which the selection decision could reasonably be based.
20. The Tribunal has no power of selection or re-selection. The Tribunal may review the matter(s) set out in the appeal and may (if required) refer the matter back to the Selectors for consideration (clause 1.12).

### SUBMISSIONS AND MERITS

21. Mr Gesini argued four grounds of appeal, which can be summarised as follows:
  - a. the Selection Policy discriminated between wheelchair and ambulant track athletes because of differing qualification periods;
  - b. 1.6(a) of Appendix 2 could not be complied with as the Applicant was unable to identify potentially affected athletes;
  - c. selectors should have exercised final selection discretion under paragraph 4.6.1;
  - d. the Applicant should have been selected under Development Athlete Slot based on exceptional circumstances.

#### **Discrimination Between Wheelchair and Ambulant Track Athletes**

22. The wheelchair track athletes' qualification period commenced on 1 May 2022, approximately 5 weeks prior to the ambulant track athletes' qualification period which commenced on 7 June 2022. Both qualification periods concluded on 28 May 2023 (Clause 4.3). This was relevant as Mr Gesini achieved an AA "B" Standard long jump of 6.21m on 4 June 2023.
23. The argument being that if the same qualifying period had applied to ambulant track athletes as to wheelchair track athletes, Mr Gesini would have qualified based on two AA "B" Selection Standard Performances within the relevant period, one of which was between 1 January 2023 and 28 May 2023 (Clause 4.4.1).
24. AA contends:



- a. Discrimination is not a relevant ground of appeal;
  - b. The Wheelchair qualifying period was extended only to provide fair and equal opportunities to wheelchair athletes and to encompass a vital event in Switzerland. AA noted ambulant athletes have more opportunities to compete than wheelchair athletes, including against able-bodied athletes;
  - c. The qualifying period available to Mr Gesini is the longest that AA has incorporated since 2015.
25. The Tribunal notes that the Applicant is competing for selection only against ambulant athletes who all have the same qualifying period and who were all notified of the relevant time frames well in advance.
26. The Tribunal determines that a longer qualification period for wheelchair track athletes is not a ground of appeal under the Selection Policy. This argument is rejected.

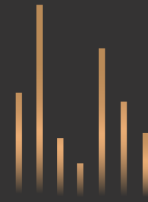
#### **Affected Athletes**

27. The Applicant argues that paragraph 1.6(a) of the Selection Policy setting out the “sole grounds of appeal” are unreasonable and cannot be complied with within the time stipulated, or at all, in that an athlete who has not been selected is unable to identify whether “a selected athlete whom the Appellant seeks to replace does not meet the Athlete Eligibility Criteria”.
28. Clause 1.6(a) provides a ground of appeal where there is “a selected athlete whom the Appellant seeks to replace does not meet the Athlete Eligibility Criteria”. For example, if all five discretionary development slots were filled by AA, it is then open to an Appellant to argue that one of those development athletes selected did not in fact meet selection criteria.
29. AA confirmed there were no affected athletes.
30. The Tribunal determines clause 1.6(a) is not applicable to this matter and rejects this ground of appeal.

#### **Phase 2 Final Selection Discretion**

31. In his amended notice, the Applicant argued that the Selectors failed to properly apply the Selection Criteria set out in the Policy and/or that there were no grounds on which the selection decision could reasonably be based. In that the selectors should have considered the Applicant’s eligibility for discretionary selection pursuant to Clause 4.6.1 of the Selection Policy prior to, or in addition to, his eligibility in a Development Athlete Slot Allocation.
32. In essence, clause 4.6.1 provides the Selection Committee with discretion to select further athletes to the Team provided they meet all eligibility requirements and:
- a. Achieves the minimum number of Selection Standard Performance as set out in 4.4.1;
  - b. Uses the remaining Development Athlete Slot Allocations; or
  - c. Combination of other factors it considers relevant, including potential to medal at the Competition or 2024 Paralympics, the number of AA “A” Selection Standard Performances, history of performances domestically and internationally and quality and consistency of performance through the Qualification Period.
33. The discretion needs to be exercised in line with the Aims of the Selection Policy. This discretion is absolute and need not be exercised (4.6.1).

#### **2. Selection Policy Aims**



Athletics Australia aims to facilitate the following outcomes through the selection of athletes for the World Para Athletics Championships:

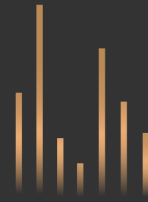
- 2.1 Send a team capable of being a top five nation at Benchmark Events;
- 2.2 Select athletes with the realistic potential to win a gold medal or finish in the top three at the 2023 World Para Athletics Championships; and
- 2.3 Select athletes who are considered potential gold medallists or top three athletes in future World Para Athletics Championships and Paralympic Games.

In all cases, the selection committee will consider each athlete’s competitive record and demonstrated ability to plan the peak of their season at a major championship.”

34. The Applicant argues he satisfies 2.3 and relies largely on:
  - a. being Australia’s best T38 long jump athlete and best para long jumper in overall percentage terms;
  - b. current world ranking of 4<sup>th</sup> at just 21 years of age;
  - c. Submission from his coaches, Iryna Dvoskina and Sebastian Kuzminski, including the expert opinion his jump of 6.33m on 18<sup>th</sup> February 2023 would highly likely qualify him for Paris 2024;
  - d. his second AA “B” level long jump of 6.21 metres on 4 June was just three days outside the qualification period 2022;
  - e. he was not at his best during the qualification period due to injuries and ill health and personal circumstances; and
  - f. He finished fourth at the World Championships 2019 with then personal best of 6.16m.
35. AA Chairman of Selectors confirmed that the Selection Committee went through the selection criteria line by line for the Applicant and did consider these factors, including injury and personal circumstances. AA agreed the Applicant was the best in Australia, but AA do not select for every event and the aims of the Selection Policy were about being one of the best in the world and not just in Australia. The Applicant’s event has developed over the last few years as evidenced through the increase in qualification criteria, namely 6.65m for AA “A” standard.
36. The Selection Committee decided there was not enough to justify the application of discretion, noting the Applicant did not have a single AA “A” standard jump, only 1 AA “B” standard jump within the required period and had many opportunities to meet the automatic criteria with 12 events and 48 jumps. There were grounds upon which a decision was made to not select.
37. The Tribunal rejects this ground of appeal.

#### **Development Athlete Slot Allocation**

38. The Applicant argues his omission from the Team was otherwise a result of a failure by the Selectors to properly apply the Selection Criteria set out in the Policy for the Development Athlete Slots; and/or that there were no grounds on which the selection decision could reasonably be based. The Selectors ought to have selected the applicant in a Development Athlete Slot based on exceptional circumstances. 4.7 of the Selection Policy covers the Development Athlete Slot Allocation.



4.7.3 The Philosophy of these Development Athlete Slots is typically to select athletes that are competing at their first World Para Athletics Championships and/or Paralympic Games, however in exceptional circumstances the Selection Committee may select athletes who have previously competed at a WPA Championships and/or Paralympic Games but meet the below criteria.

4.7.4 Without limiting its discretion, the Selection Committee, in consultation with the Athletics Australia High Performance Staff, may consider any factor, or combination of factors that in its opinion is relevant for consideration when selecting athletes for the team, including without limitation:

4.7.4.1 The athlete is likely to qualify for the Paris 2024 Paralympic Games;

4.7.4.2 The athlete is medal capable at the 2027 WPA Championships;

4.7.4.3 The athlete is medal capable at the 2028 Paralympic Games;

4.7.4.4 The athletes 2024 and 2028 campaigns will benefit from selection in the 2023 Team;

4.7.4.5 The athlete's performance trajectory in relation to the trajectory of the event; in which they are being considered for;

4.7.4.6 The athlete's performances throughout the qualifying period and their proximity to the "AA A" and "AA B" Selection Standard Performances.

4.7.4.7 Any other factor, which, in the opinion of the Selection Committee, the athlete will benefit from for future World Para Athletics Championships and/or Paralympic Games;

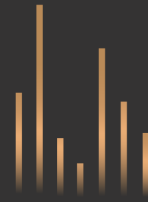
39. The Applicant does not meet the requirements of 4.7.3 because he has already competed both at Paralympics 2020 and World Championships 2019. This means the Selection Committee needed to be satisfied there were "exceptional circumstances" and the criteria of 4.7.4 were met.

40. The Applicant argues he met the additional exceptional circumstances criteria for the reasons already specified in point 34 above.

41. AA Selection Committee did consider this Development Athlete Slot discretion, but rejected its application. As per the 29 May 2023 email from the Chair of Selectors:

"The panel considered you under this clause and did not consider your circumstances particularly exceptional, especially given you were able to compete 12 times during the qualification period so your competition opportunities were not limited and therefore giving you ample opportunity to qualify in your own right which is expected for an experienced athlete such as yourself."

42. AA advised that it exercised its discretion to award 3 Development Slots (from the maximum of 5) and all three athletes have never represented Australia at World Championships or Paralympics level. No athlete met the additional "exceptional circumstances."



43. The Applicant notes he is classified as a “Developing” athlete in the Pathway Stream of the National Athlete Support Structure (**NASS Policy**) (emailed dated 8 May 2023). The aim of the Pathway Stream is to support athletes with the potential to win Senior BME medals within the next 4 to 8 years. “Developing” category is defined as athletes with realistic capacity to reach Podium Potential within approximately 2 to 4 years. The Tribunal, however, notes the Applicant was previously categorised as Podium Potential under the NASS Medal Stream and has been downgraded.
44. The NASS Policy clearly states that “NASS membership has no bearing on selection for an Australian representational team.”
45. The Selection Committee did consider the Selection Criteria and did have grounds to not exercise its discretion to use “exceptional circumstances.”
46. The Tribunal rejects this ground of appeal.

**THE TRIBUNAL THEREFORE DETERMINES:**

47. AA has a very clear Selection Policy setting out the performance standards, timeframes and selection criteria to be applied, including stated aims and objectives to assist in rationale. Discretion is specifically stated to be absolute and it is noted that it need not be exercised.
48. It was agreed that the Applicant had not met criteria for automatic selection and that he needed to rely on the AA Selection Committee exercising a discretion. There were valid and differing views between the parties as to whether or not AA should have exercised discretion. Ultimately, AA did consider and apply the selection criteria and it did have grounds for not exercising discretion.
49. Application is dismissed.

Date: 1 June 2023

Eugénie Buckley