

Case number: NST-E23-32204

Case Title: Coach v Member (with Australian Weightlifting Federation)

## Determination

### National Sports Tribunal Appeals Division

sitting in the following composition:

Panel Members

Dr Caroline Kenny KC

Mr Sal Perna AM

Ms Claire McLean PLY

in the arbitration between

**Coach**

*(Appellant)*

Represented by legal representative

And

**Member**

*(Respondent)*

Unrepresented

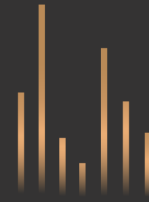
With

**Australian Weightlifting Federation**

Represented by Ian Moir, CEO

## PARTIES

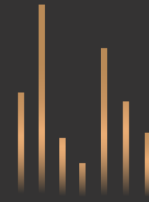
1. Coach is the Appellant (**Appellant**). The Appellant is an AWF accredited coach, and the head coach of a Weightlifting Club (**Club A**).
2. The Respondent is a Member (**Respondent**). The Respondent is a member of another Weightlifting Club (**Club B**) which is an affiliated club of NSW Weightlifting Association (**NSWWA**).



3. The Respondent made a complaint to the Australian Weightlifting Federation Limited (**AWF**) on 30 October 2022 regarding two conversations with the Appellant at the Quaycentre gymnasium at Sydney Olympic Park (**Quaycentre gym**) on 22 January 2022 and 25 January 2022.
4. AWF is the National Sporting Organisation in accordance with the definition set out in section 5 of the *National Sports Tribunal Act 2019* (Cth) (**NST Act**).
5. The Respondent's complaint was upheld by the determination made by Mr Jon Erbacher (**First Instance Tribunal**) on 6 January 2023 (**Determination**) sitting in the General Division of the National Sports Tribunal (**NST**). In the Determination the First Instance Tribunal found that the Appellant's conduct on:
  - (a) 22 January 2022 constituted bullying and harassment and a failure to respect the Respondent's right, dignity and worth in breach of the AWF's Member Protection Policy dated November 2017 (**MPP**); and
  - (b) on 25 January 2022 constituted bullying, harassment and discrimination, and a failure to respect the Respondent's rights, dignity and worth, in breach of the MPP.
6. The First Instance Tribunal imposed the following sanctions on the Appellant, namely that the:
  - (a) Appellant's membership with AWF, NSWWA or any affiliated club, be suspended for two months, which period of suspension is to be wholly suspended for a period of 12 months. Notice of this suspension is to be provided by the AWF CEO to all State Members of AWF (including NSWWA);
  - (b) Appellant provide a written apology to the Respondent acknowledging that he engaged in conduct which constituted bullying, harassment and discrimination of the Respondent, and a failure to respect her rights, dignity and worth, in breach of the MPP; and
  - (c) Appellant undertake education and refreshment on the MPP and the Codes of Behaviour by which the Respondent is bound, with evidence as to the completion of same to be provided to the CEO of AWF.

### Grounds of Appeal

7. The Appellant filed an appeal against the Determination on 3 February 2023.
8. The Appellant relied on the following grounds of appeal:
  - (a) The Appellant was denied natural justice in relation to the proceedings generally;
  - (b) The Appellant was denied natural justice because the Respondent did not call any witnesses to give evidence and to corroborate her account of the conversations with the Appellant;



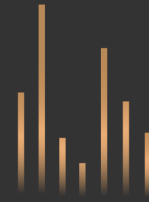
- (c) The Appellant was denied natural justice because the First Instance Tribunal failed to have regard to the Appellant's good character; and
  - (d) The sanctions imposed by the First Instance Tribunal were disproportionate to the conduct alleged.
9. The Tribunal does not agree that the Appellant was denied natural justice by the First Instance Tribunal. It dismisses the Appeal and upholds the complaint made by the Respondent but, for the reasons explained below, has varied the sanctions.

### Substance of the Complaint

10. The Respondent complains that the conduct of the Appellant which occurred at the Quaycentre gym on 22 January 2022 and 25 January 2022, constituted bullying, harassment and discrimination against her, in breach of the MPP.
11. The Appellant denied that he bullied, harassed or discriminated against the Respondent, or that he breached the MPP.
12. The Parties entered into an arbitration agreement (**Arbitration Agreement**) dated 13 December 2022 which provided for the dispute to be heard in the General Division of the NST. Clause 5.4 of the Arbitration Agreement provides that the AWF has referred the dispute to the NST for resolution under its Grievance, Discipline and Appeals By-Law (**GDABL**) which was approved by the AWF Board on 12 June 2014.
13. The Parties entered into a subsequent arbitration agreement (**Appeals Arbitration Agreement**) dated 19 May 2023 which provided for the dispute to be heard in the Appeals Division of the NST. Clause 3.3 of the Appeals Arbitration Agreement provides that the 'NST's jurisdiction is engaged until the resolution of the appeal'. By reason of clause 3.3 the NST had jurisdiction to hear the Appeal.

### Preliminary Hearing on 24 May 2023

14. A preliminary hearing was conducted on 24 May 2023 to determine whether the parties required a hearing and to clarify the evidence which would be relied on during the Appeal. At that preliminary hearing the Appellant, through his legal representative, made it clear that he wished the Respondent's witnesses to attend for cross examination. In accordance with rule 28(3) of the *National Sports Tribunal (Practice and Procedure) Determination 2021 (NST's P&P Determination)* the Tribunal requested that both parties arrange for any witnesses they wished to call in support of their case be available to give evidence at the hearing of the Appeal.
15. As the parties made it clear that they wanted a hearing, the Appeal was conducted by way of a 'rehearing' pursuant to rule 95(5) of the NST's P&P Determination. The Tribunal also determined that to conduct a rehearing it



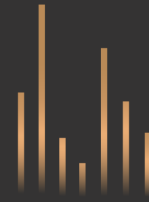
should have access to all the evidence that had been filed in the General Division which the parties wished to rely on for the purpose of the Appeal.

16. At the preliminary hearing an issue was raised about whether the Appellant would be entitled to rely on three additional Statutory Declarations which had not been relied on at the hearing in the General Division, namely: (i) a Statutory Declaration from Ms Eades dated 3 May 2023; and (ii) Statutory Declarations by the Appellant dated 1 May 2023 and 22 May 2023. The last Statutory Declaration was filed after the submission closing date agreed to by the parties in the Appeals Arbitration Agreement at clause 9.3. As the Respondent objected to those declarations being filed in the Appeal, it was necessary for the Appellant to establish there were 'exceptional circumstances' (within the meaning of rule 95(6) of NST's P&P Determination) to allow those documents to be filed in the Appeal.
17. The Appellant was given an opportunity to explain what the exceptional circumstances were at the pre-hearing and again during the hearing of the Appeal on 30 May 2023. In essence, the Appellant submitted that the exceptional circumstances were: (i) he was not allowed legal representation at the hearing in the General Division of the NST and (ii) he wanted to clarify that he had not been the subject of any previous complaint. The Tribunal did not consider these reasons constituted exceptional circumstances. It noted that legal representation was not permitted in the General Division of the NST and also that there was no dispute between the parties about whether previous complaints had been made against the Appellant. Accordingly, the additional Statutory Declarations which the Appellant wished to rely on were not allowed to be filed in the Appeal.
18. The Respondent also sought to rely on new evidence, namely, photographs and a video. The Appellant objected to the photographs but not to the video. As there were no exceptional circumstances to admit the photographs they were not permitted to be filed in the Appeal. The video was allowed to be relied on in the Appeal but the Respondent did not seek to have it played or to make any submissions about it during the Appeal.

### **Appeal Arbitration Agreement**

19. Clause 5 of the Appeal Arbitration Agreement described the main issues for determination by the Tribunal. Clause 5.4 described the Appellant's grievance with the Determination as follows:

The Appellant believes insufficient weight was given to his good character and repute, while a higher standard of proof should have been applied given the nature of sanctions. The Appellant also believes the NST Member in the General Division failed to consider the lack of corroborative evidence submitted by the Respondent and the undue delay in her reporting of the incident.



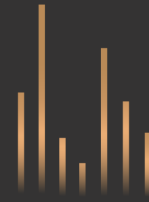
20. Clause 6 of the Appeal Arbitration Agreement provides:
- 6.1 The Appellant appeals the NST General Division determination, claiming:
    - a) he was denied natural justice, or
    - b) in the alternative, that the sanctions imposed are unjust and unreasonable.
  - 6.2 The Appellant seeks a dismissal of the proceedings.

### **Substance of the Dispute**

21. The substance of the Respondent's complaint is set out in her statement filed in the General Division of the NST that:
- (a) On Saturday 22 January 2022 the Appellant said 'You don't lift too much weight, you need to finish training by 12 pm'; and
  - (b) On Tuesday 25 January 2022 the Appellant shouted at her across the gym 'did you leave the gym at 12 pm as I told you', to which she replied 'no I didn't. I need to have enough time to warm up and train and all my team-mates were still training.' She said he then shouted at her loudly 'Do you understand English? Do you need a translator?' She said that as the Appellant left the gym, he said, in the presence of her team-mates, that she must finish her training in 1 hour and he could possibly ban her from training at Quaycentre if she didn't.
22. Club B and Club A share the Quaycentre gym facilities for training purposes and hold their training sessions at different times. There was some dispute about the training times for each club, but nothing turns on that issue for the purpose of this Appeal. There was no dispute between the parties that on 22 January 2022 it was Club B's Awards Day, and they were planning to have a team meeting after training.

### **Appeal Tribunal Hearing**

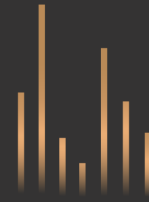
23. The hearing of the Appeal occurred by videoconference on Wednesday 30 May 2023 at 10.00 am (Australian Eastern Standard Time) and concluded at approximately 3.00pm. The hearing was conducted substantially in accordance with the procedure for disciplinary hearings set out in clauses 16, 17 and 19 of the GDABL which permits an inquisitorial approach by the Tribunal and a level of informality consistent with the general principles relating to arbitrations before the Tribunal as set out in s 40(1) of the NST Act.
24. The Appellant appeared in person and was represented. The Respondent appeared in person and was not represented. Mr Moir, the CEO of AWF, appeared on behalf of AWF.



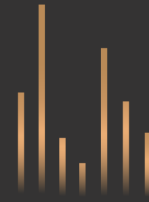
25. The Appeal Chair commenced the hearing with a formal introduction, identifying all parties and outlining the process which would be followed.

### Evidence relied on in the Appeal

26. The Appellant and the Respondent each gave oral evidence in addition to their written statements filed in the General Division of the NST and were both cross-examined.
27. In the Appeal the Appellant relied on the statement he made in response to the Respondent's complaint (which was undated but sent to the NST under cover of a letter dated 29 November 2022). He also gave oral evidence. He said that on the date of the two conversations with the Respondent he was the Chief Executive Officer and a director of the NSWWA. He said he was also the most senior coach at Quaycentre. He said that part of those roles required him to be responsible for coordination and monitoring of the operation of the Quaycentre gym and also for health and safety at the gym.
28. The Appellant said that on the 22<sup>nd</sup> January 2022 the Respondent was using the main training platform which is generally used by lifters that lift heavy weights. He said that on that occasion there was an exchange with the Respondent, and he may have said words to the effect 'you don't lift too much weight, you need to finish training by 1pm.' However, he explained that the context in which those words were exchanged with the Respondent was that Mr Leo Manny and his brother (**Manny brothers**), who generally lift heavy weights on the main platform, were waiting to use the main platform. He said that what he intended to convey to the Respondent by that exchange was that she should move to another platform and lift weights with someone who lifts the same weights as she did. The Appellant did not call the Manny brothers as witnesses in the Appeal, and therefore, his version of the context in which the comments were made was uncorroborated.
29. As to the allegation that he told the Respondent that she must 'finish training by 12pm' or 'leave the gym by 12pm' the Appellant said that he 'may have said that the gym closed at 1pm that day as there may have been a special event for Club B or other entity at 1pm or later.' He also said that he considered that 1 hour and 15 minutes was a suitable routine for a lifter who lifted weights of the same size lifted by the Respondent.
30. The Appellant stated that on this occasion he was 'in charge' at the gym as he was the senior coach, that it was a busy day, and noisy.
31. In relation to the incident on 25 January 2022, the Appellant gave evidence that he was off duty and caring for his elderly father who suffered from a debilitating disease when he was called to the gym to address a noise violation of the gym's rules. He said he was angry when he arrived at the gym because there had been a number of noise violations in the past. He said when he arrived at the gym he found the source of the noise and took the speaker and turned it



- off. He then addressed all the gym members saying in a loud voice that they should not play loud music and then said, 'do you understand English.' He said that he could not recall saying to the Respondent 'did you leave the gym at 12 pm on Saturday as I told you.' He also could not recall asking the Respondent if she understood English and whether she needed a translator. And he denied that his statements were directed to the Respondent but says they were directed to all users in the gym on that day. He stated that he specifically directed some of his comments to the coach on duty, Mr Ricky Huang (**Mr Huang**), asking how he could let the situation happen when he was a coach.
32. The Appellant said that he was angry and disappointed that he had to attend on his day off, 'forced' to leave his ill father and that the situation (loud music) should not have occurred.
  33. The Appellant also gave evidence that the Respondent's complaint was motivated by an ulterior purpose. In this regard, he said there was a discussion regarding the unsatisfactory conduct of members of Club B at a board meeting on 4 October 2022, and it was after this board meeting that the Respondent made her complaint with AWF on 30 October 2022.
  34. The Appellant also relied on the reference from Ms Eades dated 9 December 2022. Ms Eades gave evidence that she is a science teacher at Presbyterian Ladies College, Croydon, Sydney and is also presently the Association Secretary and Board Member of the NSWWA. She said she had known the Appellant since September 2007. She said in managing the Quaycentre gym the Appellant was 100% focused on safety in the gym and was eager for women to be involved in the sport. She said she found him to be honest and to have the highest integrity. She said he treated all people well, including women of all ages and made sure people were in the right place at the right time. She also said she was not aware of any other complaints that had been made against the Appellant.
  35. The Respondent gave oral evidence consistent with two statements filed in the General Division of the NST. In relation to the incident on 22 January 2022 she said that she arrived at the gym at 10.45 am and, as it was Club B's Awards Day, the Club was planning to have a team meeting at 1.00pm after the completion of training. She said when she arrived at the gym, there was only one platform (of about 12 in total within the gym) which was vacant. She put her bags on the platform and started to warm up. She said when the Appellant saw her at the platform, he approached her and said, 'You don't lift much weight, you need to finish training by 12pm.' She said the Appellant did not tell any other weightlifter to finish their training or leave the gym by 12pm.
  36. She said she considered the Appellant's remarks to her were 'intimidating and discriminatory to me as a Masters/older lifter who competes in the lightest women's bodyweight category' and that 'I felt it was not fair because everyone needs to warm up and cool down and do all the sets of exercises on the training programs in their own time. In my opinion, one hour is definitely not



enough for safe training. Especially for people who are older and need more time to warm up.’ She denied that the Manny brothers were waiting to train on the main platform as the Appellant had said in his evidence.

37. She said she did not respond or argue with the Appellant because she had previously witnessed him threatening and intimidating others in the gym, and she was aware that he had suspended other members of Club B from attending the Quaycentre gym in the past. She said she continued her training until around 1.00pm, after which she attended the Club B team meeting and Awards Day.
38. The Respondent also gave evidence, consistent with her statements filed in the General Division of the NST, in relation to the exchange with the Appellant on 25 January 2022. She said the Appellant arrived at the gym and blamed Jono Miu for playing loud music, grabbed his speaker, and then turned to her shouting ‘did you leave the gym at 12pm on Saturday as I told you?’, ‘Do you understand English? Do you need a translator?’. She said he proceeded to berate her as he left the gym, threatening her again that she must finish her training within one hour and that he might ban her from the gym if she did not do so.
39. The Respondent called two witnesses: Mr Thomas Shannon (**Mr Shannon**) and Mr Huang. They had filed short statements on 29 November 2022 and 28 November 2022 respectively. Their statements were read to them, and they accepted they were true.
40. Mr Shannon’s witness statement said:

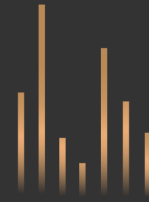
Have observed multiple occasions where Member was reprimanded and specifically targeted by Coach. On one occasion I witnessed Coach pressuring/demanding Member to leave the gym early as in his words stated ‘you do not lift a lot’, denying her the fair use of our weightlifting facilities. Furthermore, on a separate occasion, I have witnessed Coach making racially discriminatory comments to Member such as ‘do you need a translator’ and ‘do you understand English’.

41. Mr Huang’s witness statement said:

I have witnessed multiple events where Member was disfavored [sic] at such events. On 22 January 2022, which was a Saturday, a pre-planned event was hosted by the head coach Dr Robert Mitchell which would celebrate the outstanding individual performances throughout the year. Coach’s conversation with Member started with her being told ‘You must leave before 12pm’, ‘you do not lift a lot.’

The week following on the Tuesday 25<sup>th</sup> of January, Coach was called into quay centre by the management team for ‘loud music’, afterwards he would focus his attention on Member asking about her leaving the training venue on the 22<sup>nd</sup>. As she replied, ‘no didn’t’, Coach’s attitude



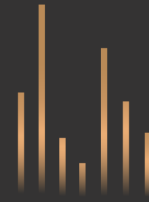


became apparent with anger and started to berate Member ‘Did you not understand me’, ‘Do you need a translator’, ‘Do you understand English.’

42. When questioned by a member of the Tribunal both Mr Shannon and Mr Huang confirmed that the only occasions when they witnessed the exchanges between the Appellant and the Respondent were the two exchanges on 22 January 2022 and 25 January 2022.

### Main Submissions of the Parties

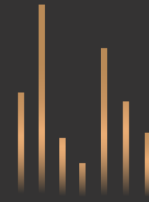
43. In oral submissions the legal representative on behalf of the Appellant contended that the statement ‘you don’t lift much weight’ was not discriminatory of master lifters. He submitted that if the statement was made, it did not constitute harassment, bullying or intimidation, alternatively, it was at ‘the lower end’ of the scale of what would constitute harassment, bullying or intimidation. He also contended that if the complaint is made out, the sanctions should be less severe than those imposed by the First Instance Tribunal in the Determination. He submitted that the Appellant was responsible for the conduct of lifters at the gym which extended to issues of noise, attire, safety and adherence to rules and that it was a dangerous environment requiring strict adherence to rules. He added that the Appellant had no power to ban lifters for breaking rules as that was a matter for the Board of NSWWA. He also said that over the years the Appellant had told numerous lifters to move from platforms and/or shorten their training times.
44. In relation to the 25 January incident, the legal representative contended that the Appellant was there to address the noise complaint and did not target the Respondent. He also said that the Appellant’s evidence was that he originally approached Mr Huang as the senior coach in attendance.
45. The legal representative submitted that if the complaint is made out the appropriate sanction would be for the Tribunal to issue a warning. He also submitted that the Tribunal should apply the ‘Briginshaw test’ and find that the Appellant’s conduct was at the lowest level of seriousness. The reference to the ‘Briginshaw test’ is to the High Court authority in *Briginshaw v Briginshaw* (1938) 60 CLR 336 which determined, *obiter dicta*, that where serious conduct is alleged a court should apply a different standard of proof to the ordinary civil standard of proof ‘on the balance of probabilities.’ The legal representative did not explain how the *Briginshaw v Briginshaw* standard should be applied in this instance, nor make submissions on how it differs from the ordinary civil standard of proof. There has been debate in the authorities about what the exact standard is, but there is general acceptance that the more serious the allegation the more it is necessary for a court or tribunal to be satisfied that the conduct did occur: see the comprehensive discussion in Loretta de Plevitz, “Briginshaw ‘Standard of Proof in Anti-Discrimination Law: Pointing with a wavering Finger’” [2003] *Melbourne University Law Review* 308 (**de Plevitz article**).



46. The legal representative added that the Appellant's record of 50 years in the sport, which included numerous awards and a life of volunteering, should be taken into consideration. He also volunteered that an appropriate sanction would be for the Appellant to provide a written apology along the lines: 'I do not recall making these statements to you, but if you have taken offence, I withdraw them unequivocally.'
47. The Respondent submitted that the Appellant's conduct, the subject of the complaint, was of a 'very serious nature.' She said the statement made on 22 January 'you don't lift much weight; you need to finish training by 12 pm' was very discriminatory to her. She said that there are no rules about who uses which platform, and everyone should have the opportunity to choose on a 'first come, first serve' basis. She said she was worried that the Appellant 'would do something to my membership and I would not be able to train at Quaycentre or compete in future competitions.' She said this fear and the Appellant's 'power' in the NSWWA was established by the facts that the Appellant called Ms Eades (who is presently the secretary of the NSWWA but at the time the complaint was made was the membership officer) and, at the hearing in the General Division of the NST, he was supported by Ms Mary Macken, the President of the NSWWA.
48. The Respondent said the Tribunal should take into consideration recent statements made by the CEO of Sport Integrity Australia and a recent suspension of an athlete for 3 years for making a racist remark. She added that the Tribunal should impose a more serious sanction than had been imposed by the Determination. The Tribunal is aware of the statement made by the CEO of Sport Integrity Australia and this is referred to more generally when determining the appropriate sanction. The Respondent did not provide any details in relation to the alleged suspension of an athlete for 3 years and, in the circumstances, the Tribunal is unable to confirm whether such a sanction was imposed or have regard to it for the purpose of determining an appropriate sanction in this Appeal.
49. Mr Moir did not make any submissions on behalf of AWF in relation to the merits of the Respondent's complaint. However, he did confirm to the Tribunal that since the Determination was made, he has checked the records of the NSWWA and spoken to the former President who was in office between 1984 and 2007 and confirmed that no previous complaint had been made against the Appellant.

### **Findings in relation to the evidence**

50. The Tribunal considers that where there is a discrepancy between the evidence of the Appellant and the Respondent the evidence of the Respondent is to be preferred. Her written statements and oral evidence about the exchanges with the Appellant on 22 January and 25 January 2022 were clear and concise.

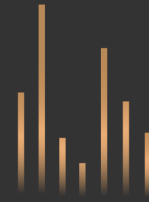


Additionally, the statements and oral evidence of Mr Shannon and Mr Huang tend to corroborate the Respondent's recollection of events.

51. Moreover, the Appellant admitted that he may have had the exchange with the Respondent on 22 January but sought to explain the exchange by stating that the Manny brothers wanted to use the main platform. This was denied by the Respondent and the Appellant did not call either of the Manny brothers to confirm his version of events.
52. Clause 11.1 of the Appeal Arbitration Agreement provides that the GDABL does not apply to an appeal from the NST General Division to the NST Appeals Division. Clause 11.1 requires the Appeal to be conducted in accordance with the NST Act, the National Sports Tribunal Rule 2020, and the NST P&P Determination. Rule 55 of the NST P&P Determination provides the standard of proof and method of establishing facts and presumptions are to be as set out in the constituent documents of the sporting body, or in the separate agreement between the parties to the dispute referring the dispute to the Tribunal. It also provides that the 'default standard' is on the balance of probabilities. Clause 12.1 of the GDABL provides that the relevant standard of proof for a disciplinary matter is the civil standard, being the balance of probabilities and that the Tribunal need only be satisfied that a fact is established 'to its reasonable satisfaction on the balance of probabilities.' Having regard to the default standard in clause 55 of the NST P&P Determination and clause 12.1 of the GDABL the Tribunal is of the view that the balance of probabilities is the appropriate civil standard to apply for the purpose of this appeal.
53. The Tribunal notes that the *Briginshaw v Briginshaw* standard has been applied by several racial discrimination tribunals in Australia. In *Ebber v Human Rights and Equal Opportunity Commission* (1995) 129 ALR 455 Drummond J said (at 468) that 'a finding of unlawful conduct could only be made against the respondents if it was proved to the standard referred to in *Briginshaw v Briginshaw*.' Other examples of the application of that standard are referred to in the de Plevitz article (see paragraph 45 above). In that article the author criticises the routine application of the *Briginshaw v Briginshaw* standard by racial discrimination tribunals. The Tribunal notes that in this Appeal the Tribunal is not required to make a determination of whether the Appellant's conduct was unlawful, but only whether it contravened the MPP. However, for the sake of completeness the Tribunal notes that if the higher standard of proof in *Briginshaw v Briginshaw* had been the correct standard to apply it would also have been satisfied that the Respondent's complaint was made out according to that standard.

### **Application of the GDABL and the MPP to the evidence**

54. Clause 1 of the GDABL provides that it works in accordance with and supports the MPP. Clause 1.2 provides that the GDABL governs the conduct and



process of all grievances, discipline, appeal matters and other issues within the jurisdiction of AWF.

55. The General Code of Behaviour is incorporated into the MPP by Part D1 and relevantly provides that:

As a member of the AWF a member association or an affiliated club or a person required to comply with the AWF's member protection policy, you must meet the following requirements in regard to your conduct during any activity held or sanctioned by the AWF, a member association or an affiliated club and in any role you hold within the AWF, a member association or an affiliated club:

1. Respect the rights, dignity and worth of others.
- ...
9. Refrain from any form of abuse towards others.
10. Refrain from any form of harassment toward others.
11. Refrain from any form of discrimination toward others ...

56. Clause 9 of the MPP provides that it is a breach of the MPP for any person or organisation bound by the MPP to do anything contrary to the MPP, including but not limited to:

- 9.1 breaching the General Code of Behaviour;
- 9.4 discriminating against, harassing or bullying any person;
- 9.8 verbally assaulting another person, intimidating another person or creating a hostile environment within the sport.<sup>1</sup>
- ...

57. Clauses 11.1 and 11.2 of the GDABL specify that it is an 'offence' to breach the GDABL or a 'Rule' including the General Code of Behaviour in the MPP.

58. Clause 11.3 of the GDABL provides that a person to which the GDABL applies will be guilty of an offence under the GDABL if they breach the GDABL or AWF Rule, without reasonable excuse for doing so. It says:

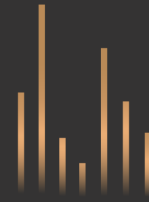
**11.3. Breach of the GDABL or AWF Rule**

A person will be guilty of this offence where:

- 11.3.1. the GDABL or AWF Rule asserted to have been breached was in effect as at the time the offence occurred;

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<sup>1</sup> Clause 9.8 of the MPP.



11.3.2. the Person's conduct breached the relevant section of the GDABL or AWF Rule; and

11.3.3. there was no reasonable excuse for the breaching of the GDABL section or AWF Rule.

59. Clause 7.3.2 of the MPP defines harassment in the following terms:

**Harassment**

Harassment is any unwelcome conduct, verbal or physical, that intimidates, offends or humiliates another person and which happens because a person has a certain personal characteristic protected by State or Federal anti-discrimination legislation.

The offensive behaviour does not have to take place a number of times, a single incident can constitute harassment.

60. Bullying is characterised under clause 7.9 of the MPP as:

repeated, unreasonable behaviour directed at a person, or group of persons, that creates a risk to health and safety. Bullying behaviour is that which a reasonable person in the circumstances would expect to victimise, humiliate, undermine, threaten, degrade, offend or intimidate a person.

While generally characterised by repeated behaviours, a one-off instance can amount to bullying.

The following types of behaviour, where repeated or occurring as a part of a pattern of behaviour would be considered bullying:

- verbal abuse including shouting, swearing, making belittling remarks or persistent unjustified criticism;
- ...
- psychological harassment such as intimidation.

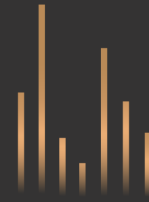
61. Clause 11 of the MPP provides that discrimination occurs:

when someone is treated unfairly or less favourably than another person in the same or similar circumstances because of a particular characteristic.

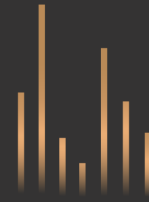
...

In Australia it is against the law to discriminate against someone because of their

- age;
- ...
- race;
- ...



62. As to the 22 January incident, the Tribunal finds, on the balance of probabilities, that the Appellant's conduct constituted harassment and bullying, as well as a failure to respect the rights, dignity and worth of the Respondent in breach of the MPP (which incorporates the General Code of Behaviour). Although the Respondent says she felt discriminated against as an elderly master lifter the Tribunal considers there is insufficient evidence that the exchange between the Appellant and the Respondent on 22 January constituted discrimination.
63. As to the 25 January incident, the Tribunal finds, on the balance of probabilities, that the Appellant's conduct constituted harassment, bullying and discrimination on the basis of race, as well as a failure to respect the rights, dignity and worth of the Respondent, in breach of the MPP (which incorporates the General Code of Behaviour). The Tribunal finds that the remarks were directed to the Respondent and there was no justification for making them. As to the offence of discrimination, the Tribunal considers the reference to whether the Respondent spoke English and required a translator was made having regard to her Chinese origin and in circumstances when the Appellant must have understood that the Respondent spoke English very well. The Tribunal is of the view that the questions were not genuine and were asked to belittle her in front of her team-mates.
64. Moreover, the Tribunal is of the view that asking the Respondent whether she had left the gym on the 22<sup>nd</sup> January as the Appellant had asked her to and threatening to ban her from the gym constitutes the offence of bullying and harassment under the MPP because the statement was intended to humiliate, intimidate and offend the Respondent in front of her team-mates.
65. The Appellant gave evidence that the Respondent's complaint was motivated by events which transpired at the Board meeting of NSWWA on 4 October 2022. However, the Tribunal found this evidence confusing and not convincing. Moreover, the Respondent said the delay in making the complaint was because she considered the Appellant was 'very powerful' and because he had previously banned weightlifters from competing in NSWWA. She said she was 'scared that [the Appellant] would do something to my membership and I would not be able to train at Quaycentre or compete in any future competitions'. Moreover, the Respondent said that, as the Appellant was then the CEO of NSWWA, she did not feel confident making a complaint to NSWWA or talking to anyone from the Board of NSWWA about the matter. She said that, in late October 2022, as she was preparing to work as a technical official for the AWF, she reviewed the AWF website and found out the AWF had a grievance policy and a member protection policy and following that discovery she took steps to submit her complaint to AWF. The Appellant said her concerns about the Appellant's powerful position at the NSWWA were justified in circumstances where the Appellant initially sought to have the president of NSWWA, Ms Mary Macken, attend the hearing in the General Division of the NST as his support person, and relied on a character reference from Ms Eades.



66. The Tribunal does not consider that the Respondent was motivated by an ulterior purpose in making the complaint. The Respondent provided an explanation for the delay in making the complaint. Moreover, the timing of the complaint is not relevant as there was no suggestion that the complaint was not filed within time.

## Sanctions

67. At the conclusion of the hearing, the parties were invited to make submissions as to the sanctions which the Tribunal should impose in the event that the Appellant's conduct the subject of the complaint was found to have breached the MPP and GDABL.
68. The Appellant made oral submissions to the effect that he has been involved in the sport of weightlifting, in various capacities including as an athlete, coach and official, since 1974. He also relied on the character references from Ms Eades dated 9 February 2022. Ms Eades gave evidence about the Appellant's good character, integrity, and the fact that no prior complaints had been made against him. That evidence is accepted by the Tribunal.
69. The Respondent made oral submissions to the effect that the complaint raised serious matters and the Appellant's conduct had hurt and affected her.
70. Clause 10 of the MPP provides that the AWF disciplinary measures are outlined in the GDABL. Clause 17.10 of the GDABL provides:

### 17.10. Sanction and Penalty

If there is a finding of guilt as to a Complaint the Respondent(s) will have the opportunity to make submissions to the Tribunal in relation to any sanctions that may be imposed. This may include the provision of material as to character or other issues in mitigation. The Tribunal Secretary will inform the Tribunal of any other issues such as first offence etc.

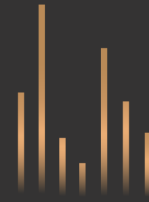
71. In determining an appropriate penalty clause 19.1 of the GDABL provides 'the Tribunal may take notice of any previous findings against the Respondent, of a similar nature, as that substantiated by the Tribunal.' Clause 19.2 and 19.3 sets out other factors that the Tribunal may have regard to in determining an appropriate penalty:

### 19.2. Mitigation and Character

The Respondent is able to address the Tribunal as to any issues of mitigation that they consider ought to be taken into account in relation to the penalty to be awarded. This may include the person's age, their involvement with the sport, the previous discipline history, issues of character including witness statements and related matters.

### 19.3. Other Factors

In awarding any Penalty the Tribunal must ensure that it:



- 19.3.1. observes any contractual and employment rules and requirements;
- 19.3.2. conforms to the principles of natural justice;
- 19.3.3. be fair and reasonable;
- 19.3.4. be based on the evidence and information presented; and
- 19.3.5. be within the powers of the Tribunal to impose the disciplinary measure.

The form of discipline to be imposed on an individual or organisation will depend on factors such as:

- 19.3.6. the nature and seriousness of the behavior [sic] or incidents;
- 19.3.7. the ability to enforce disciplinary measures if the individual is a parent and/or spectator;
- 19.3.8. if the individual knew or should have known that the behavior [sic] was a breach of the AWF By-Law, Policy, or Rule;
- 19.3.9. the wishes of the Complainant;
- 19.3.10. level of contrition of the Respondent(s);
- 19.3.11. the effect of the proposed disciplinary measures on the person, including any personal, professional or financial consequences;
- 19.3.12. if there have been relevant prior warnings or disciplinary action;
- 19.3.13. if there are any mitigating factors.

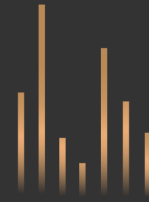
72. Clause 19.4 of the By-Law provides for a range of individual penalties:

#### **19.4. Individual Penalties**

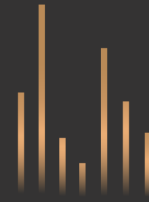
Subject to contractual and employment requirements, one or more of the following forms of discipline may be imposed by the Tribunal:

- 19.4.1. a direction that the individual make a verbal and/or written apology;
- 19.4.2. a written warning;
- 19.4.3. a direction that the individual attend counselling to address their behaviour;





- 19.4.4. a withdrawal of any awards, scholarships, placings, records, achievements bestowed in any competitions, activities or events held or sanctioned by AWF;
  - 19.4.5. a demotion or transfer of the individual to another location, role or activity;
  - 19.4.6. a suspension of the individual's membership or participation or engagement in a role or activity;
  - 19.4.7. termination of the individual's membership, appointment or engagement;
  - 19.4.8. recommend that AWF terminate the individual's membership, appointment or engagement;
  - 19.4.9. In the case of a coach or official, a direction that the relevant Organisation de-register the accreditation of the coach or official for a period of time or permanently;
  - 19.4.10. Any other form of discipline that the Tribunal considers appropriate. When imposing any form of discipline, it will be accompanied by a warning that a similar breach of this By-Law or the Member Protection By-Law or any AWF Rules or Policies, (including the Codes of Conduct), by that individual in the future may result in the imposition of a more serious form of discipline.
73. In determining an appropriate penalty, the Tribunal has had regard to the age of the Appellant, his long involvement in and standing in the weightlifting sport, his unblemished complaint record and the strong character references provided by Ms Eades.
74. The Tribunal further takes into account the following mitigating factors. First, the Tribunal considers the nature and seriousness of the offending conduct is at the lower end of the scale and was confined to two occasions, with the more serious offending occurring on 25 January 2022. Second, the Appellant's conduct on 25 January 2022 occurred in aggravated circumstances arising from (i) having been called to the gym on his day off when he was rostered to look after his sick father; and (ii) his frustration and anger with a noise complaint in respect of premises for which he was responsible.
75. However, the Tribunal also considers it relevant in assessing an appropriate penalty that (i) the Appellant contested the allegations in the General Division and again during the Appeal; (ii) that he has not demonstrated any level of contrition for his conduct; and (iii) having regard to role as director and CEO of NSWAA, and given his extensive experience in the sport of weightlifting, he



should have known that his conduct was in breach of the MPP and GDABL (including the Codes of Conduct).

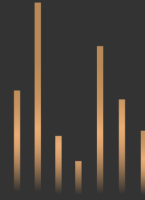
76. The Tribunal is aware of the recent comments made by Sport Integrity Australia CEO, David Sharpe, who called for a united approach to combat the rising instances of racial abuse in Australian sport (Threats to Sport Integrity conference, May 2023). The Tribunal agrees with those comments and in the circumstances of this case considers that a mere warning to the Appellant would be an insufficient sanction to mark its disapproval of the Appellant's conduct. Having regard to all the circumstances the Tribunal considers that the appropriate sanction is that the Appellant undertake education and refreshment on the MPP (including the Codes of Behaviour) by which he is bound and provide evidence as to the completion of same to the CEO of AWF. In imposing this sanction, as required by clause 19.4.10 of the GDABL, the Tribunal also warns the Appellant that a similar breach of the GDABL or the MPP or any AWF Rules or Policies (including the Codes of Conduct) in the future may result in the imposition of a more serious form of discipline.
77. Whilst the Tribunal imposes no other sanctions, it considers the offer by the Appellant to issue an apology to the Respondent (as referred to in paragraph 46) is a pragmatic and effective way of helping to ensure a good working relationship with the Respondent in the future. Accordingly, the Tribunal requests that the Appellant give serious consideration to honouring that offer.

### **Costs of the Appeal**

78. Both parties were invited to make submissions on who should pay the costs of the Appeal. The legal representative submitted on behalf of the Appellant that costs should follow the event. As the Appeal has been dismissed, the Tribunal orders the Appellant to pay the costs of the Appeal.

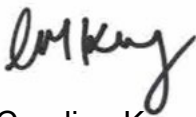
### **THE TRIBUNAL THEREFORE DETERMINES:**

- 1. The Appeal is dismissed.**
- 2. The Appellant's conduct on 22 January 2022 constitutes bullying and harassment, and a failure to respect the Respondent's rights, dignity and worth, in breach of the MPP.**
- 3. The Appellant's conduct on 25 January 2022 constitutes bullying, harassment and discrimination, and a failure to respect the Respondent's rights, dignity and worth, in breach of the MPP.**
- 4. The Appellant undertake education and refreshment of the principles of the MPP (including the Codes of Behaviour) by which he is bound, and provide evidence as to the completion of same to the CEO of AWF.**



5. **As required by clause 19.4.10 of the GDABL the Appellant is warned that a similar breach of the GDABL or the MPP or any AWF Rules or Policies, (including the Codes of Conduct), in the future may result in the imposition of a more serious form of discipline.**
6. **The Appellant pay the costs of the Appeal.**

Date: 26 June 2023 (decision given 30 May 2023)



Caroline Kenny KC, Presiding Arbitrator



Sal Perna AM, Member



Claire McLean PLY, Member