

NST-E23-365072

Astin Darcy v Archery Australia

Determination

National Sports Tribunal General Division

sitting in the following composition:

Panel Member

Mr Nicholas Pane KC

in the arbitration between

Astin Darcy
Self-represented

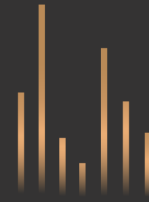
(Applicant)

And

Archery Australia

(Respondent)

Represented by Darren Kane, legal representative, Sara Dailey, National Integrity Manager and Rick Hastie, CEO of Archery Australia.



PARTIES

1. The Applicant is an athlete participant in the sport of archery and is a member of the Respondent's Athletes Committee.
2. The Respondent is the Australian national sports organisation for the sport of the archery, and is recognised as such by the Australian Sports Commission and the Australian Olympic Committee.

INTRODUCTION

3. The Applicant participated in an Archery Australia QRE Event (**Event**) at the Diamond Valley Archery Club on 16 July 2023. The Event was comprised of a morning competition session and an afternoon competition session.
4. The Applicant (and other competitors) attended the nearby Yarrambat Golf Club to purchase lunch between the morning and afternoon competition sessions.
5. At issue in this arbitration is whether the Applicant consumed alcohol with his lunch at the Yarrambat Golf Club, and if so, whether in doing so he was in breach of:
 - a. Archery Australia's Safety Guidelines which relevantly provide:

"Alcohol and drugs must not be consumed by anyone prior to or while shooting. No person may shoot when under the influence of alcohol or drugs."
 - b. Section 2.3.4 of World Archery's Constitution and Procedures which relevantly provide:

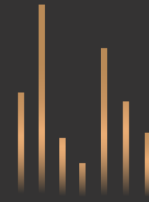
"Alcohol is a banned substance in archery. No person on the field of play shall consume alcohol or be under the influence of alcohol as prohibited in 2.3.4 Alcohol Test."

NST JURISDICTION

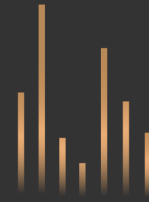
6. This Tribunal has jurisdiction to hear and determine this matter by reason of:
 - a. section 23(1) of the National Sports Tribunal Act 2019; and,
 - b. clause 5.4(g)(ii)(A) of Archery Australia's Conduct and Disciplinary Policy.

PROCEEDINGS BEFORE THE NST

7. When this matter was first referred to the Tribunal it concerned three archers, the Applicant, Mr Potts and Ms Haywood. It was alleged each had consumed alcohol at the Yarrambat Golf Club on 16 July 2023.
8. By reason of the unavailability of Mr Potts and Ms Haywood, it was determined to proceed with the Applicant in the first instance.
9. An Arbitration Agreement was entered into by the Applicant (14 November 2023) and the Respondent (13 November 2023).



10. The Respondent delivered its submissions on 14 November 2023, together with its evidentiary exhibits comprising:
 - a. the Respondent's:
 - i. Conduct and Disciplinary Policy – Investigation Report;
 - ii. Safety Guidelines;
 - iii. QRE Policy;
 - iv. Athlete Commission Charter;
 - v. Template Athlete Agreement, and
 - vi. Conduct and Disciplinary Policy;
 - b. World Archery's Constitution and Procedures;
 - c. statement of Markus Kuhrau dated 22 July 2023;
 - d. photograph taken by Markus Kuhrau on 16 July 2023;
 - e. statement of Markus Kuhrau dated 20 October 2023;
 - f. statement of Alice Ingley dated 19 October 2023;
 - g. email from Sara Dailey (redacted) dated 23 October 2023;
 - h. series of ten photographs taken by Sara Dailey dated 19 October 2023, and
 - i. email from Rhian Bird dated 18 July 2023.
11. The Applicant delivered a single submission on 24 November 2023. The Applicant also relied on an email exchange with Karen O'Malley between 19 and 24 November 2023 in relation to the interpretation of various guidelines.
12. At a directions hearing held on 30 November 2023, the parties agreed, subject to considering any reply submissions, to the matter being determined on the papers.
13. On 1 December 2023, the Respondent delivered its reply submissions and further evidence relating to the times the Applicant was competing on 16 July 2023.
14. On 4 December 2023, the Applicant sought to rely on further evidence comprising a photograph and three video recordings. The video recordings were of the Applicant, and were produced to show in practice that the Applicant would not have been under the influence of alcohol on commencement of the afternoon competitive archery session. I did not allow the video recordings into evidence as they were out of time and I considered I had sufficient experience with the human bodies' ability to process alcohol.
15. On 5 December 2023, I informed the parties that I proposed to determine the matter on the papers. No objection was received to the determination of the matter on the papers.

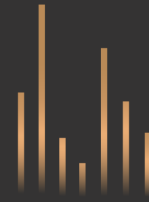


FACTUAL BACKGROUND

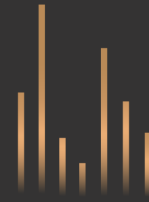
16. While I have considered all the evidence and legal submissions submitted by the parties in this Determination, I only refer to the submissions and evidence I consider necessary to explain my reasoning.
17. The following factual matters are not in dispute:
 - a. On 16 July 2023 the Applicant attended a QRE Archery event at Diamond Valley Archery Club located at 669 Yan Yean Road, Yarrambat.
 - b. The Applicant competed in the morning competition session from 10.33am to 12.08pm.
 - c. Following the morning competition session, the Applicant (together with two other archers, Mr Potts and Ms Haywood) attended the nearby Yarrambat Golf Club, located at 649 Yan Yean Road, Yarrambat, to purchase and eat lunch.
 - d. Markus Kuhrau (a competitor) and Alice Ingley (a coach) were also in attendance at the Yarrambat Golf Club, for at least part of the time the Applicant was there.
 - e. The Applicant competed in the afternoon competition session from 1.52pm to 3.32pm.
18. What is in dispute is nature of the beverage purchased by the Applicant for lunch at the Yarrambat Golf Club.
19. The Applicant states (Response Warning of Alleged Breach 2 August 2023) that the beverage he consumed was non-alcoholic beer served in a glass.
20. The Respondent contends that the beverage consumed by the Applicant was an alcoholic beer. The Respondent relies on the following direct evidence:
 - a. A statement from Markus Kuhrau (22 July 2023) to the following effect:

“From what I could see they all had 1 drink, but I left early...”
 - b. A statement of Markus Kuhrau (22 July 2023) of a conversation with another person:

“When I left I had a chat with the person who served them and she confirmed it with me that it was definitely not alcohol free drinks.”
 - c. A statement of Markus Kuhrau (20 October 2023) of an enquiry – “There was an enquiry made to the staff who was the one that served them. The question was asked, was the drink alcohol free? To which I got the response, no the drinks were not alcohol free, were they not supposed to have it?”
 - d. A photograph taken by Markus Kuhrau of Mr Potts and Ms Haywood at the Yarrambat Golf Club with two glasses in front of them.
 - e. A statement of Alice Ingley (20 October 2023) – “I found him [the Applicant] sitting at an outside table of the golf club with a drink that appeared to be a beer...”
21. The Respondent also relies on the following evidence from Matthew Weisheit the General Manager of the Yarrambat Park Golf Course:
 - a. That zero strength alcohol beer is only sold in a stubby or a can and is not available on tap.



- b. That Great Northern zero alcohol beer was only served in a stubby.
 - c. That zero alcohol beer in stubbie or cans was not generally poured into a glass unless specifically requested by the patron.
 - d. The glass in front of the female in the photo (taken by Markus Kuhrau) is a schooner (425 ml) while the glass in front of the male appears to be a pint size and glass shape.
 - e. The beer head around the inside of the glass in front of the male in the photo (taken by Markus Kuhrau) is unlikely to be of zero alcohol as neither product (Great Northern or Carlton) leave a head mark like that and the stubby would not have filled the pint glass that high. It would be more likely therefore, that the pint glass contained a tap beer, all of which contain a level of alcohol.
 - f. It is impossible to tell from the Point of Sale (POS) system at the Golf Club whether zero or mid strength Great Northern beer is purchased as the POS system records both as Great Northern Super Crisp.
 - g. The sale of two Great Northern Super Crisp beverages were recorded in the POS system at the Golf Club at 12.13pm on 16 July 2023.
 - h. The sale of two pints of Cascade Light were recorded in the POS system at the Golf Club at 12.21pm on 16 July 2023.
 - i. The sale of a schooner of Bulmer's cider was recorded in the POS system at the Golf Club at 12.27pm on 16 July 2023.
22. On 27 July 2023 the Respondent issued the Applicant a Warning: Invitation to Comment under its Conduct and Disciplinary Policy – Warning Procedure. The Warning: Invitation to Comment informed the Applicant:
- a. that the Respondent had been made aware of the Alleged Breach on 17 July 2023; and,
 - b. that if the Alleged Breach was established it would likely constitute a breach of the following policies of the Sport:
 - i. 2018 AA Safety Guidelines s2;
 - ii. World Archery Rulebook CI 1.5 and 2.2.4, and
 - iii. 1002 AA Code of Conduct – General Code of Conduct Guidelines and Competitions Behaviour.
23. On 2 August 2023 the Applicant responded to the Warning: Invitation to Comment:
- a. stating “the beverages consumed were non-alcoholic drinks, served in a glass at 1200, along with their meal”;
 - b. contending that even if the beverage was alcoholic, it was consumed 90 minutes before shooting commenced and therefore any alcohol would have been processed by the human body before shooting, so that the Applicant would not have been under the influence of alcohol when shooting;



- c. contended that the guideline referring to the consumption of alcohol “prior to or while shooting” should be interpreted as prohibiting persons from shooting whilst under the influence of alcohol, and
 - d. noting that the Applicant despite having been observed consuming the allegedly alcoholic beverage was permitted to participate in the competition.
24. On 5 September 2023, the Respondent issued a Breach Offer under its Conduct & Disciplinary Policy to the Applicant. The sanction offered to the Applicant on acceptance of the Alleged Breach was a reprimand, together with a direction to attend counselling and training and a 12 month good behaviour bond.
25. By email dated 19 September 2023, the Applicant informed the Respondent that did not accept the Breach Offer and that he intended to vigorously defend the matter.

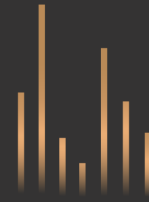
APPLICABLE RULES

26. Clause 9.1 of the Arbitration Agreement provides that the arbitration will be conducted, where appropriate, in accordance with the Respondent’s Conduct and Disciplinary Policy.
27. Clause 2.7 of the Respondent’s Conduct and Disciplinary Policy addresses the standard of proof required in any disciplinary proceedings, it provides:
 - “(a) The Standard of proof that applies to all decisions made under this policy (including a Hearing Tribunal) is ‘balance of probabilities’.
 - (b) For a Hearing Tribunal to find something has been proven on the balance of probabilities, it must be satisfied that on the evidence put before it the alleged fact or matter is more probable than not. In reaching that conclusion, the Hearing Tribunal must take into account all relevant factors including the impact of the potential sanctions that may be imposed if the allegations are proven.”
28. I consider the reference to taking into account the impact of the potential sanctions to be a reference to the Briginshaw principle and the need to be actually persuaded and reasonably satisfied of the matters alleged against the Applicant. The Briginshaw principle is also relevant to the consideration of whether evidence should be excluded.

MAIN SUBMISSIONS OF THE PARTIES

29. As set out at paragraph 5 above, the issue in this arbitration is whether the Applicant consumed alcohol with his lunch at the Yarrambat Golf Club, and if so, whether in doing so he was in breach of:
 - a. Archery Australia’s Safety Guidelines which relevantly provide:

“Alcohol and drugs must not be consumed by anyone prior to or while shooting. No person may shoot when under the influence of alcohol or drugs.”



- b. Section 2.3.4 of World Archery's Constitution and Procedures which relevantly provide:

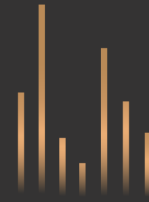
"Alcohol is a banned substance in archery. No person on the field of play shall consume alcohol or be under the influence of alcohol as prohibited in 2.3.4 Alcohol Test."

The first issue

30. The first issue in dispute is whether the Applicant consumed alcohol.
31. The Respondent relies on the evidence of Markus Kuhrau, Alice Ingley and Matthew Kuhrau to establish on the balance of probabilities that the Applicant did, on 16 July while present at the Golf Club, consume alcohol in the form of one or more alcoholic beverages.
32. The Applicant denies consuming alcohol stating that the beverage he consumed was non-alcoholic.

The second issue

33. The second issue in dispute, whether consumption of alcohol in the circumstances of this case is in breach of the Respondent's safety guidelines and/or section 2.3.4 of World Archery's Constitution and Procedures, only falls to be considered if I am satisfied that the Applicant consumed alcohol.
34. The Respondent's submissions in relation to the second issue are straightforward: it contends (at paragraph 16 of its submissions) that by "this conduct [consuming alcohol] Darcy did contravene the abovementioned provisions...".
35. The Applicant's submissions include an analysis of the rules. The Applicant contends:
- a. the Safety Guideline is vague and requires interpretation;
 - b. the reference to consumption of alcohol prior to shooting ought be interpreted as consumption of alcohol whilst participating on the field of play or shooting whilst under the influence of alcohol, and
 - c. to be in breach of World Archery rule 2.3.4 it is necessary to consume alcohol on the field of play or to be under the influence of alcohol on the field of play.
36. The Respondent's reply submission addresses the Applicant's analysis of the rules, contending:
- a. the Safety Guideline is brief and intentionally broad;
 - b. the Safety Guideline requires competitors (a) not to have consumed alcohol prior to competing and (b) not to be effected by or under the influence of alcohol while competing, and
 - c. if it is proven that the Applicant did so consume alcohol, it must then be determined that the Applicant was under the influence of alcohol at the time that he competed in the Afternoon Session.



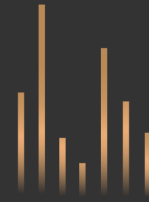
MERITS

The first issue

37. The Applicant denies ordering and consuming alcoholic beer at the Golf Club. He does not deny ordering and consuming a glass of beer, but he says it was non-alcoholic.
38. The Respondent has the burden of establishing that the Applicant ought not be believed. The Respondent relies on the evidence of Markus Kuhrau, Alice Ingley and Matthew Weisheit.
39. Markus Kuhrau saw the Applicant have one drink. In his first statement (22 July 2023), he does not describe the drink. In his second statement (20 October 2023), he refers to saying jokingly “nice beer”, but does not otherwise describe the Applicant’s drink. Ms Ingley states she saw the Applicant “with what appeared to be a beer”.
40. The high point of Mr Kuhrau’s statement is the evidence of his exchange with the staff member of the Golf Club who it is said sold the drink. I have difficulty with that evidence because it is not specific to the Applicant, rather it is referring to ‘them’, being the Applicant, Mr Potts and Ms Haywood. The lack of precision concerns me because Ms Ingley’s evidence is that Mr Potts and Ms Haywood “were at the front of the order line” and separate from the Applicant, who she “found .. sitting at an outside table of the golf club.” Accordingly, I am not satisfied that the statement of the staff member is sufficiently certain as to the Applicant’s drink.
41. The evidence of Mr Weisheit is that there was:
 - a. a purchase of cider at 12.27pm;
 - b. a purchase of two pints of Cascade Premium Light beer at 12.21pm, and
 - c. a purchase of two Great Northern Super Crisp beers at 12.13pm.
42. I am not satisfied that the Applicant purchased the Cascade Premium Light beer, as Ms Ingley’s evidence is that Mr Potts and Ms Haywood “were at the front of the order line” and separate from the Applicant who she “found .. sitting at an outside table of the golf club.” That being the case, I cannot discount the possibility that the Applicant purchased his beverage at 12.13pm rather than 12.21pm, in which case the evidence of Mr Weisheit is that the POS system does not differentiate between zero or mid strength Great Northern beer, as the POS system records both as Great Northern Super Crisp. The evidence of Mr Weisheit as to the volume of the glasses in the photo taken by Mr Kuhrau are of no assistance, as there is no evidence of the volume of the Applicant’s beverage.
43. Having considered all the evidence and submissions, I am not satisfied that it is likely the Applicant consumed an alcoholic beverage at the Yarrambat Golf Club on 16 July 2023 as alleged by the Respondent.

The second issue

44. As I am not satisfied the Applicant consumed alcohol, it is not necessary to determine the second issue.
45. That said, if I was required to determine the second issue, I would not accept the Respondent’s submission that if it is found the Applicant consumed alcohol, it must then be determined that



the Applicant was under the influence of alcohol at the time that he competed in the Afternoon Session.

46. The Safety Guideline must be given a common-sense interpretation. The words “prior to or while shooting” are to be construed in the context of the immediately following words “when under the influence of alcohol”. That is, the timeframe for consumption of alcohol prior to shooting, is a time frame within which alcohol can have an influence.
47. In this context, before the consumption of a beer (full strength or mid-strength) can be considered a breach of the Safety Guideline, it will be necessary to consider whether the competitor is likely to be under the influence of alcohol at the time of competing. In this case, I would have reservations as to whether a single mid-strength beer (285ml, 375ml or 500ml) consumed at 12.30pm would have any influence on a competitor competing at 1.52pm.
48. I note that section 2.3.4 of World Archery’s Constitution and Procedures addresses two matters: first, the consumption of alcohol on the field of play; and second, a competitor being under the influence of alcohol on the field of play. In this case, there is no evidence suggesting the Applicant was under the influence of alcohol on the field of play. There is also no evidence that the Applicant consumed alcohol on the field of play. The only evidence is that the Applicant may have consumed alcohol at the Golf Club, which is not the field of play.

THE TRIBUNAL THEREFORE DETERMINES:

1. That the allegation that the Applicant consumed alcohol before or during competition on 16 July 2023 has not been proven.
2. The Applicant was not in breach of the Respondent’s Safety Guidelines and/or section 2.3.4 of World Archery’s Constitution and Procedures.

Date: 12 December 2023



Nicholas Pane KC