

Case number: NST- E24-270449

Case Title: Ambrosia Malone v Hockey Australia

## Reasons for Determination

### National Sports Tribunal General Division

sitting in the following composition:

Panel Member

Scott Ellis

in the arbitration between

**Ambrosia Malone**

*(Applicant)*

Represented by Lorraine Madden, Hale Legal

And

**Hockey Australia**

*(Respondent)*

Represented by Ian Fullagar, Lex Sportiva, David Pryles, CEO, and Bernard Savage, High Performance Director.

And

**Grace Stewart**

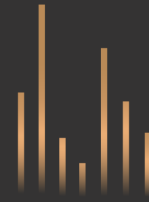
*(Affected Parties)*

**Alice Arnott**

**Stephanie Kershaw**

**Renee Taylor**

**Amy Lawton**

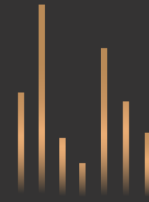


## OVERVIEW

1. Ms Ambrosia Malone (applicant) is a professional hockey player and a long-term member of Australia's national women's hockey team, the Hockeyroos.
2. She was not nominated by Hockey Australia (respondent) for selection by the Australian Olympic Committee Inc (AOC) in the Hockeyroos squad to participate in the Paris 2024 Olympic Games (decision).
3. This arbitration is an appeal from that decision. It is brought pursuant to clause 9.6(c)(ii) of the Olympic Team Nomination and Selection By-Law (By-Law) and s 23 of the *National Sports Tribunal Act* (Act).
4. Because of time constraints associated with the selection process, it was necessary to make a decision by 5pm EST on 28 June 2024. On 28 June 2024, I made a decision dismissing the appeal.
5. I was not able to prepare my reasons by 28 June 2024. The By-Law permits reasons to be provided within 3 business days after a decision is made. These are my reasons.
6. In summary, the applicant contends that decision should be set aside on the following grounds:
  - a. the respondent's National Selection Panel (Panel) was affected by actual bias in making the decision;
  - b. the Panel did not correctly apply the Nomination Criteria (Criteria) adopted by the respondent; and
  - c. there was no material on which the decision could be reasonably based.
7. I do not accept these contentions. In my opinion, there was material on which the decision could reasonably have been based. I do not consider that the Panel incorrectly applied the Criteria. The Criteria are broadly expressed, conferring a wide-ranging discretion on the Panel. I do not consider that Ms Malone was misled about factors which the Panel considered in making the decision or acted to her detriment in reliance of feedback provided by Ms Katrina Powell, the Head Coach of the Hockeyroos. The matters identified in the reasons fall within the scope of the Criteria. The evidence provided by the applicant fell well short of establishing actual bias in making the decision.
8. My reasons are set out in greater detail below.

## JURISDICTION

9. The respondent is a 'National Federation' (NF) for the purposes of the By-Law.
10. The By-Law regulates the process by which athletes are selected for competition at the Olympic Games, including, relevantly, the Paris 2024 Olympic Games.
11. In broad terms, an NF nominates a number of players in its sport for selection by the AOC. The AOC may only select athletes nominated by the NF. Nomination by the NF is, therefore, a requirement for selection. It is the AOC which selects athletes for competition.
12. The By-Law deals generally with the process by which athletes are nominated by the NF. The Nomination Criteria used by an NF must be approved by the AOC.



13. The By-Law provides for appeals in respect of the non-nomination of an athlete by the NF. Where the NF has made an election in accordance with clause 9.5(b)(ii) of the By-Law, the nomination appeal is to be heard in the General Division of the Tribunal in the first instance. The respondent has made an election, and accordingly, any appeal in respect of a nomination decision is to be made to the Tribunal.
14. Clause 9.6 also provides that a nomination appeal may not proceed unless the parties have undertaken a defined process in accordance with that clause. There was no suggestion that the applicant had not complied with the requirements of clause 9.6 of the By-Law.
15. Section 23 of the Act provides that an application may be made to the Tribunal where a dispute arises between a sporting body, such as the respondent, and a person bound by documents pursuant to which the body operates and the document permits the dispute to be heard in the general division of the Tribunal. These circumstances described above fall within s 23.

#### *Conclusion*

16. The Tribunal has jurisdiction pursuant to s 23 of the Act.

#### **PROCEDURE**

17. The application to the Tribunal was received by the Tribunal on 24 June 2024. An amended version was provided on 25 June 2024.
18. The matter was allocated to me by letter from the Chief Executive Officer of the Tribunal dated 26 June 2024.
19. Because of time limits associated with the Olympic selection process, it was necessary that the decision be made by 5pm EST on 28 June 2024. If reasons are not given at the same time as the decision, reasons may be provided within 3 business days thereafter.
20. Because of the same time constraints, the timetable for the provision of material was abbreviated.
21. The following materials were provided:

- a. Ms Malone:

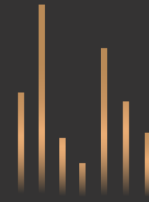
- i. Applicant's Submissions
- ii. witness statement of Ms Malone dated 26 June 2024, together with annexures AM1 ('Viber' message) and AM2 ('NSP's Reasons for Decision not to nominate Ambrosia Malone to the AOC') (Reasons).

The applicant also provided a copy of the Hockey Australia 2024 Selection Policy Handbook (Handbook).

- b. Hockey Australia:

- i. Respondent's Submissions;
- ii. witness statement of Katrina Powell;

22. Ms Malone's provided the following witness statement in response:



- a. Ms Malone;
  - b. Ashlea Wallis;
  - c. Kalindi Commerford;
  - d. Laura Barden;
  - e. Madison Fitzpatrick;
  - f. Rachael Lynch; and
  - g. Savannah Fitzpatrick.
23. Some of the responsive witness statements did not appear to respond to the respondent's material. They dealt with matters that properly formed part of the applicant's case. The respondent did not have the opportunity to respond substantively to them. However, given the conclusion I have formed on the merits, the respondent has not been prejudiced as a result. I have considered all the material provided by the parties.
24. The parties did not require an oral hearing. Accordingly, the decision was made on the papers.

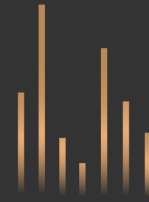
#### **AFFECTED PARTIES**

25. Clause 9.5(d) of the By-Law provides that an appeal forum (ie the Tribunal) may, in its absolute discretion, identify a person who is interested in the outcome of an appeal. The By-Law requires that the affected parties receive notice of the appeal and be given the opportunity to make submissions and give evidence.
26. I formed the view that the persons identified as the 'Attacking Line' in Annexure A to the 'NSP's Reasons for Decision not to Nominate Ambrosia Malone to the AOC' (Reasons) were affected parties. They were contacted by the Tribunal registry. The following persons indicated that they wished to be treated as affected parties:
- a. Grace Stewart;
  - b. Alice Arnott;
  - c. Stephanie Kershaw;
  - d. Amy Lawton; and
  - e. Renee Taylor.

Ms Kershaw provided a statement supporting the decision. The others did not provide statements.

#### **GROUND OF REVIEW**

27. The grounds on which the applicant challenged the decision were:
- (B) the applicable Nomination Criteria was not properly applied by the Non-Nominated Athlete's NF;
  - (C) the NF was affected by actual bias in making its decision with respect to the Non-Nominated Athlete; and



(D) there was no material on which the NF's decision could be reasonably based.

These grounds fall within the grounds permitted by clause 9(c)(ii) of the By-Laws.

28. Clause 9(c)(ii) also provides that the appellant bears the onus of making out the ground.
29. I will deal with the grounds after setting out matters relating to the nomination criteria

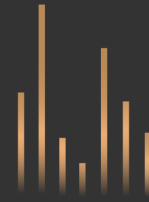
### THE NOMINATION CRITERIA

30. The objective of the Handbook<sup>1</sup> is to define the 'selection process for the 2024 Olympic Hockey teams'.
31. Clause 2.1 says:

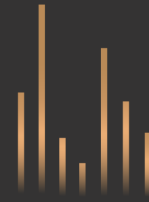
Hockey Australia's selection policy is to choose two teams of players which will provide the best chance of producing podium performance at the Paris 2024 Olympic Games.
32. There are 4 Annexures to the Handbook:
  - a. Annexure A – Hockey Nomination Policy (ie the Criteria);
  - b. Annexure B – AOC Olympic Team Nomination and Selection By-Law (ie the By-Law);
  - c. Annexure C - AOC Olympic Team Selection Criteria; and
  - d. Annexure D - Hockey Australia Selection and Appeals Policy (HASAP).
33. Clause 2.3 of the Policy specifies an order of precedence. It is:
  - a. the By-Law;
  - b. Annexure C - AOC Olympic Team Selection Criteria; and
  - c. The Criteria.
34. The order of precedence applies to the extent that there is any inconsistency between the documents. The HASAP is not mentioned in the order of precedence. Presumably, it comes last.
35. The decision not to nominate the applicant for inclusion in the Hockeyroos squad was made by the Selection Panel (Panel).
36. Clause 6.1 of the Handbook provides that the Panel will be made up of a Chair appointed by the High Performance Committee, the national Head Coach and the National Assistant Coaches. Ms Rechelle Hawkes was appointed as independent Chair. Ms Powell as the Head Coach and, Jeremy Davis and Hugh Purvis as Assistant Coaches, are ex officio members.
37. Clauses 6.1 to 6.4 of the Criteria are relevant:
  - 6.1 The National Federation will nominate eligible Athletes who, in the opinion of the National Federation, in its absolute discretion and in no particular order:

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<sup>1</sup> Page 4.



- (a.) will be most likely to achieve the highest competitive results at the Games;
  - (b.) is, and will remain until the conclusion of the Games, a positive ambassador for the Sport, National Federation and the Games.
- 6.2 In making its determination under clause 6.1 with respect to an Athlete, the National Selection Panel may have regard to any, all or none of the following considerations, in its absolute discretion and in no particular order:
- (a.) an Athlete's current form and performance;
  - (b.) an Athlete's playing record between 23 July 2021 and 27 June 2024;
  - (c.) an Athlete's physical capabilities as outlined in the National Federation's "Physical Development Framework" document ...;
  - (d.) an Athlete's technical skills;
  - (e.) an Athlete's tactical ability;
  - (f.) an Athlete's set play and specialist skills;
  - (g.) an Athlete's adherence to squad values and his or her ability to influence others in a positive manner;
  - (h.) an Athlete's psychological characteristics important in a high-performance training and competition environment;
  - (i.) an Athlete's potential to progress in the areas set out at clauses 6.2(c) to 6.2(h), including an Athlete's present performance level relative to any past performances; and
  - (j.) specific positional requirements to achieve optimal team balance at the Games as determined by the National Selection Panel in its absolute discretion;
- 6.3 For the avoidance of doubt, the factors set out in clause 6.2 will be considered by the National Selection Panel in relation to the National Federation's specific "Way of Play" playing philosophy as directed by the National program from time to time.
- 6.4 Notwithstanding anything in this Nomination Criteria, in having regard to any of the considerations in clause 6.2, the National Selection Panel has in its absolute discretion the right to decide in the case of each Athlete the relevant weighting of each consideration where it applies two (2) or more considerations.



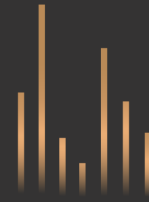
38. Clause 3.2.1 of the Handbook also articulates selection criteria. Clause 3.2.1 uses slightly different language to clauses 6.1 to 6.4 but the effect is the same.
39. The HASAP appears to be a document that is generally applicable to the respondent's national selection processes. Its applicability to Olympic *nomination* is not clear. Annexure D also sets out selection criteria at 4.2. Those criteria substantially reflect clauses 6.1 to 6.4 of the Criteria, again, in slightly different language.
40. In addition to setting out selection criteria, clause 4.6.2 of the HASAP contains the following:
- When comparing Athletes' performance, the predominant function of the Selection Panel's discretion is to determine the relevance of each of the Selection Criteria and the weight attributable to them. For the Selection Panel to exercise its discretion prudently, judiciously and with sound judgment it is required to:
- a) Act reasonably and justly;
  - b) Act in good faith and for proper purposes;
  - c) Consider the Selection Criteria; and
  - d) Consider relevant information and disregard irrelevant considerations.
41. The applicant quoted this passage in its submissions but did not identify how this passage was applicable to the *nomination* process. However, the reasons of the Panel effectively quoted this passage, so it may be taken to apply.

**GROUND D: NO MATERIAL ON WHICH THE DECISION COULD REASONABLY BE BASED.**

42. It is convenient to deal with ground D first. The applicant contended the decision not to nominate her was 'not reasonable' on a review of the circumstances as a whole.<sup>2</sup>
43. After the respondent became aware that the applicant was dissatisfied with the decision, the Panel provided a statement setting out its reasons for the decision (Reasons).<sup>3</sup>
44. Ms Malone was considered for a position as a striker. It appears she was not considered for a position as an attacking midfielder or an attacking midfielder/striker. Ms Malone does not take issue with this aspect of the nomination process.
45. The Reasons incorporate a document entitled 'Attacking Outcomes Matrix' (Matrix), which is annexure A to the Reasons.
46. The Matrix is a table which identifies players in the 'Attacking Line' The 'Attacking Line' includes strikers, attacking mid-fielders and attacking midfielders/strikers. There were 9 players on the Matrix, including the applicant. The Matrix assigns points to players based on various outcomes associated with those athletes. The outcomes for which points were assigned in the Matrix are penalty corners, goal shots and goals scored. Penalty corners and goal shots get a point per outcome, while actual goals get 1.5 points per goal. The points for each player are totalled, and

<sup>2</sup> Applicant's submissions at [30].

<sup>3</sup> Annexure AM2 to the applicant's statement.



then divided by the number of games played, to give an outcome per game. It appears that the Matrix used data from the period February 2024 to June 2024.

47. There was no challenge to the accuracy of the data recorded in the Matrix: it was not contended that the statistics recorded in the Matrix did not reflect players' outcomes during the games from which they were derived.
48. Ms Malone accumulated 29 points overall. She had played 20.75 games, resulting in an 'outcome per game' score of 1.40.
49. Although Ms Malone accumulated more points than two other strikers, Ms Arnott and Ms Stewart, they had each played fewer games than Ms Malone, resulting in 'outcomes per game' figures which were greater than Ms Malone's. They scored 2.30 and 2.05 respectively. On an outcome per game basis, Ms Malone ranked below Ms Arnott and Ms Stewart.
50. In the 'Attacking Line' as a whole, Ms Malone ranked fifth. Ms Peris and Ms Kershaw scored 2.00 and 1.80 respectively on the 'outcomes per game' basis. Ms Peris was categorized as an 'attacking midfielder/striker'. Ms Kershaw was categorized as an 'attacking midfielder'.
51. The Reasons also compared the strikers on a 'goals/game' basis.<sup>4</sup> Ms Malone came in third behind Ms Stewart (1 goal/game) and Ms Arnott (1 goal/4 games). Ms Malone scored 1 goal every 5 games.
52. The conduct recorded in the Matrix is clearly relevant to the prospects of the team scoring during a game and the frequency with which goals might be scored. It is material which might legitimately be considered is assessing whether a particular attacking player is more likely than another attacking player to assist the team to 'achieve the highest competitive results at the Games'. This is the primary criterion identified at 6.1 of the of the Criteria and clause 2.1 of the Handbook. Indeed, it is difficult to understand how a selection panel could have failed to take such information into account when evaluating strikers. The same may be said of the other outcomes measured items in the Matrix — penalty corners and goal shots.
53. In addition to the information tabulated in the Matrix, the reasons contained qualitative assessments. The Panel considered that Ms Malone was behind Ms. Stewart and Ms Arnott in 'physicality in and around the circle'.<sup>5</sup> The Panel also considered that Ms Malone 'did not have the ability to appropriately and consistently apply attacking principles within the WOP when compared directly to other strikers'.<sup>6</sup> The other strikers were considered to be better than the applicant at application of defensive principles.<sup>7</sup>
54. The Panel considered that having three strikers would not achieve 'optimum balance' and nominated only two strikers for the specific positional requirements.<sup>8</sup> Ms Malone was not nominated.

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<sup>4</sup> Reasons at [6].

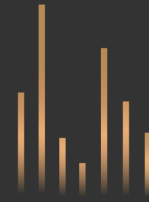
<sup>5</sup> Reasons at [7].

<sup>6</sup> Reasons at [9]. 'WOP' is a reference to the respondent's 'Way of Play' identified in clause 6.3 of the Criteria.

<sup>7</sup> Reasons at [8].

<sup>8</sup> Reasons at [11].





55. There was material on which the Panel's ranking of Ms Malone could be based and an evidentiary basis for selecting the two higher ranked strikers. The decision is an apparently reasonable one based on relevant material.
56. Ground D must be rejected.

## **GROUND B: IMPROPER APPLICATION OF NOMINATION CRITERIA**

### *Introduction*

57. In her submissions, Ms Malone contended that the Panel did not act in accordance with the clause 4.2. of the HASAP and the Criteria in the following respects:
  - (a) misleading Ms Malone into focusing on an aspect of her game (passing), in order to damage her performance;
  - (b) misleading Ms Malone into believing that the Panel would not consider goal scoring and opportunities as their primary consideration;
  - (c) failing to inform Ms Malone that the Selection Panel would only consider performances between February 2024 and June 2024;
  - (d) failing to reasonably and justly consider Ms Malone's prior performances;
  - (e) failing to act in good faith to Ms Malone;
  - (f) failing to consider relevant information and disregard irrelevant considerations; and
  - (g) seeking to justify their decision by providing Ms Malone with a Matrix, the methodology of which Ms Malone has demonstrated in her witness statement is fundamentally flawed.
58. The first contention arises out of feedback which the applicant received from Ms Powell.
59. The applicant contended that the effect of the feedback was that she should focus on passing in preference to scoring goals,<sup>9</sup> so that the emphasis of the Reasons and Matrix was unfair to her.
60. The applicant referred to a meeting between her and Ms Powell in March 2023.<sup>10</sup> Ms Malone did not give evidence about all the matters discussed during that meeting. She recounted an exchange to the following effect:

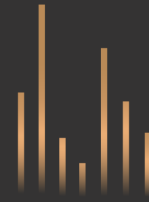
Ms Malone: Aren't you happy with all the goals I've scored?

Ms Powell: It's not all about the goals, Rosie.

Ms Malone said that Ms Powell also said 'I want you to focus on your passing game' and that she wanted to see Ms Malone passing the ball more often.

<sup>9</sup> See Malone statement at [42], Applicant's submissions at [20(a)],

<sup>10</sup> Malone statement at [27] to [33].



61. The applicant said that passing more was the ongoing focus in the feedback provided by Ms Powell on passing.<sup>11</sup> She said that she only received positive feedback from Ms Powell about her passing.<sup>12</sup> The applicant stated that she took Ms Powell's feedback on board and concentrated on passing.<sup>13</sup> She contended that, as a result, her goal scoring rate declined from 3.1 games per goal.<sup>14</sup> She also gave evidence that, implementing the feedback from Ms Powell, she created goal scoring opportunities for others, rather than creating scoring opportunities for herself.<sup>15</sup>
62. Ms Powell's witness statement accepts that feedback was given to Ms Malone to work on her passing. However, Ms Powell maintains that that feedback was provided in context of 'encouraging her to develop ... aspects of her game that would improve her overall performance'.<sup>16</sup> Ms Powell also contended that feedback about passing was provided in the context of 'her reading and interpretation of the game, her decision making on ball and its consistency with the 'Team Way of Play'.
63. I accept that Ms Malone was given feedback which identified passing as an area for improvement. However, at [6] of her responsive statement Ms Malone discussed feedback she received from Ms Powell at their meeting on 19 November 2023. Ms Malone said of the feedback:
- ... I would consider the type of feedback Ms Powell refers to, to be consistent with the general type of feedback I am accustomed to receiving throughout my playing career. It is always more focused on area's (sic) of improvement, and as such I disputed that it is "positive and encouraging", rather it is the expected norm.
64. Ms Powell's feedback overall would have been seen in the same way – as an area for improvement, rather than identification of an all-important factor in Olympic nomination. Identifying passing as an area of weakness is far from suggesting that goal scoring was not central to her role as a striker.
65. At paragraph [10] of her witness statement, Ms Malone states that her understanding of her position as striker 'as being focused primarily on scoring goals and setting up goals for other members of the team'. Feedback around passing is consistent with the latter aspect of Ms Malone's understanding of her role as a striker.
66. In addition, Ms Powell discussed feedback provided to the applicant during the Team's European tour. Ms Powell gave evidence that the team was provided with feedback about the need to improve 'attacking outcomes'.<sup>17</sup> The applicant received specific feedback about her low goals scored and penalty corners won.<sup>18</sup> Similar feedback was provided on 11 June 2024 in

<sup>11</sup> Malone statement at [33], [34], [36], [39] and attachment 'AM1'.

<sup>12</sup> At [33] and [37].

<sup>13</sup> Malone statement at [38].

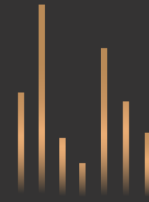
<sup>14</sup> At [43]. The statement says 3.1 goals per game, but this is clearly an arithmetical error. She scored 30 goals in 94 games.

<sup>15</sup> At [46].

<sup>16</sup> Powell statement at [15].

<sup>17</sup> Powell statement at [35].

<sup>18</sup> Powell statement at [35].

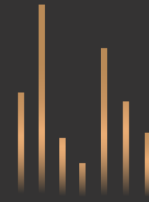


London.<sup>19</sup> Ms Malone did not specifically dispute the nature of the feedback provided on these occasions.

67. In this context, I do not consider that Ms Malone would have understood Ms Powell's feedback as suggesting that she should have reduced her efforts to score goals or achieve the other outcomes identified in the Matrix. I do not accept that Ms Powell misled Ms Malone about her performance. There was no evidence that feedback was given in order to damage the applicant's performance.
68. I do not accept the contention that Ms Powell misled Ms Malone into believing that 'the Selection Panel would not consider goal scoring and opportunities as their primary consideration'. The applicant could not reasonably have been surprised by a selection process for strikers which emphasized the outcomes identified in the Matrix. She was in contention for a position as a striker. Further, attacking outcomes were identified during the meetings on 28 May 2024 and 11 June 2024 discussed at paragraph [66].
69. The applicant contended that the Panel failed to inform her that the Panel would only consider performances between February 2024 and June 2024. I do not consider that the Panel was under a duty to inform the applicant of details of the Matrix, and, in particular, the period over which the game outcomes would be taken into account. The first of the criteria specifically mentioned in item 6.2 is 'current form'. The February 2024 and June 2024 time period relates to 'current form'. The weight to be given to current form as opposed to the playing record back to 23 July 2021 is a matter for the Panel.
70. The Panel's discretion in taking those criteria into account is intended to be extremely broad. The Panel is entitled to give as much or as little weight to any of the specified factors as it things fit. This appears both from clause 6.2 and clause 6.4. The Panel was not obliged to develop a matrix which involved outcomes over a period longer than February 2024 to June 2024. While it appears to be accepted that the Panel was obliged to act reasonably and justly, this is an obligation owed to all the athletes under consideration. It does not require the Panel to give more weight to some of the criteria than to others or enable the Tribunal to substantively review that discretion because of the impact of the weighting on particular athletes. It is inevitable that application of the criteria will result in the non-nomination of some candidates.
71. The applicant also contended that the Panel failed to act in good faith towards Ms Malone. To the extent that that contention is based on the feedback given to Ms Malone, that issue is dealt with above. To the extent that that contention is based on allegations of actual bias towards Ms Malone, it is dealt with below.
72. In her statement Ms Malone contended that the Matrix was defective for the following reasons:
  - a. the Matrix did not take into account other contributions to overall team performance because it ignored back-tackling and intercepts which lead to scoring opportunities for other players and ignores the impact of drawing defending players from the circle and the need to tag a high goal scorer;

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<sup>19</sup> Powell statement at [36].



- b. the two strikers selected (and Ms Perris) had had long periods during which they were injured and unable to play and that this unfairly or inappropriately increased their ranking in the Matrix. This discriminated against fit players;<sup>20</sup> and
- c. although the Panel had identified only two spots for strikers, the team would not actually operate in that way. There would in practice be three specialist strikers, and Ms Malone was the third of the specialist strikers being considered for the team.<sup>21</sup>
- d. players were not made aware that the Matrix was being used and could not respond to it or alter their way of playing; and
- e. the Matrix only took into account outcomes from February 2024 to June 2024, when clause 6.2 empowers the Panel to have regard to an athlete's playing record between 23 July 2021 and 27 June 2023.<sup>22</sup>

73. It may be that the Panel could have constructed a matrix that:

- a. identified and measured other criteria for the purpose of identifying players for the squad (eg tackling back and intercepts); or
- b. paid more regard to the absolute number of goals scored, than to the number of goals scored per game; or
- c. placed greater emphasis on the playing record for the period 23 July 2021 to 31 December 2023; or
- d. placed greater emphasis on the risk associated with player injury.

Similarly, the Panel could have come to different conclusions about the number of specialist strikers that should have been nominated.

74. However, it is not for the Tribunal to say what calculations the Panel should have applied or what weight it should have given to the specific matters mentioned in the Criteria in making its decision. The weight to be afforded to the various factors identified in the Criteria is a matter for the Panel. It is for the Panel to assess whether players who had been injured would be physically able to perform reliably during the Olympic campaign. It is for the Panel to assess whether two or three specialist strikers is best.

75. While the Matrix was important, and has an objective character, the Panel's reasons were not confined to a mechanical application of the Matrix. The Panel specifically referred to other considerations, and rated Ms Malone below Ms Stewart and Ms Arnott. The Panel indicated that it took all the Criteria into account in making its decision.<sup>23</sup>

76. This aspect of the application is not made out.

## ACTUAL BIAS

### *Introduction*

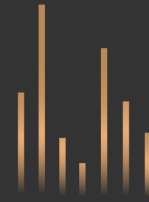
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<sup>20</sup> Malone statement at [75].

<sup>21</sup> Malone statement at [80].

<sup>22</sup> Applicant's submissions at [23].

<sup>23</sup> Decision at [2].



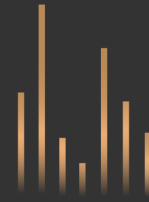
77. The applicant contended that there was actual bias against her on the part of the Panel.
78. The applicant's submissions did not touch on legal principles associated with proof of actual bias in respect of a decision by a body such as the respondent. The respondent did provide submissions dealing with the issue. The authorities referred to by the respondent reflect the remarks of the WA Court of Appeal in *WKS v The State of Western Australia*,<sup>24</sup>:

Insofar as the appellant asserts actual bias, the principles were outlined by Gleeson JA (Emmett and Tobias JJA agreeing) in *Reid v Commercial Club (Albury) Ltd* and may be summarised as follows.

- (1) A finding of actual bias is a grave matter. An allegation of actual bias must be distinctly made and clearly proved. Such a finding should not be made lightly, and cogent evidence is required.
  - (2) If there is an allegation of prejudgment, the party making that claim must establish that the judge is 'so committed to a conclusion already formed as to be incapable of alteration, whatever evidence or arguments may be presented'.
  - (3) There are distinct elements underlying an assertion of prejudgment: that the judge (i) has an opinion on a relevant aspect of the matter in issue in the particular case; (ii) will apply that opinion to the matter in issue; and (iii) will do so without giving the matter fresh consideration in light of whatever may be the facts and arguments relevant to the particular case.
  - (4) The test requires an assessment of the state of mind of the judge in question, although it is not confined to an intentional state of mind. Bias may be subconscious.
79. In *Maloney v New South Wales National Coursing Association Limited*<sup>25</sup> Glass JA referred to a situation where the decision makers of a sporting association 'developed an actual bias which no evidence or argument is likely to overcome'.
80. The allegation of actual bias was made against the background that Ms Malone had had a very successful hockey career. I do not propose reciting all the details of Ms Malone's playing career. However, highlights include:
- a. playing 114 games for the Hockeyroos, including the Tokyo 2020 Summer Olympics, and the 2018 and 2022 World Cups and appearing at all other tournaments since her inclusion in the national squad;
  - b. in 2023, Ms Malone was:
    - i. named as one of the top 5 women's hockey players in the world by the Federation of International Hockey;

<sup>24</sup> [2020] WSSCA 178. See also *Maloney v New South Wales National Coursing Association Ltd* [1978] NSWLR 161 at 172; *Sun v Minister v Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 134.

<sup>25</sup> [1978] 1 NSWLR 161 at 172.

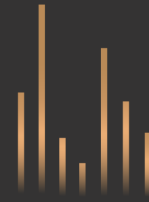


- ii. awarded the Hockeyroos' top goal scorer in 2023; and
- iii. named as the third best performing Hockeyroo for 2023.

81. In this context, it might be seen as surprising that Ms Malone was not nominated.
82. The applicant contended that actual bias was to be inferred from the following matters:
- a. Ms Powell setting Ms Malone up for failure by requesting that Ms Malone focus on her passing game instead of her role as a striker in scoring goals;
  - b. Ms Powell never offering positive feedback to Ms Malone in situations where positive feedback was provided to other Hockeyroos players;
  - c. Ms Powell hi-fiving other players on the team but not hifiving Ms Malone;
  - d. Ms Powell failing to advise Ms Malone of issues with her performance in the same manner that other squad members had been informed;
  - e. Ms Powell and other members of a previous Selection Panel unreasonably failing to select Ms Malone for the Hockeyroos in the past and/or failing to adequately provide feedback to Ms Malone prior to their non-selection in the past.<sup>26</sup>
83. The application does not rely on conduct by members of the Panel other than Ms Powell.
84. The allegation that Ms Powell 'set Ms Malone up' for failure arises out of the feedback provided by Ms Powell is discussed above in the context of the selection criteria. For the reasons given above, I do not consider that the feedback required or contemplated that Ms Malone would focus on passing instead of scoring goals. As a striker in the national team, she would have been expected to do both. Ms Malone accepted that providing opportunities for other members of the team to score is part of her role as a striker. There is, in any event, no evidence that the feedback was not given in good faith for the purpose of improving the performance of the team as a whole. I do not accept that it was given for the purpose of 'setting up' Ms Malone, whatever effect it might have had.
85. The applicant complained about a lack of positive feedback from Ms Powell. She specifically complained about Ms Powell not 'hi-fiving' her, or giving her praise for significant achievements, such as being the top goal scorer in 2023. Although congratulations were given when the applicant was named one of the top 5 international women's hockey players, those congratulations were, by the applicant's account, perfunctory.
86. However, Ms Powell gave evidence that there were occasions on which she gave what she considered was positive feedback. Ms Malone indicated that she did receive positive feedback from Ms Powell, albeit about passing.
87. On balance, I consider it likely that Ms Powell's relationship with Ms Malone was less positive than her relationships with other members of the team. This is not to say that the relationship was hostile, combative or unprofessional.
88. I do not accept that Ms Powell failed to inform the applicant of issues with her performance. It appears common ground that there was a meeting between Ms Powell and the applicant on 28

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<sup>26</sup> Applicant's submissions at [20].



May 2024.<sup>27</sup> Ms Powell said that this occurred before the first game of the tour of Belgium and that the applicant was given details of ‘what the selectors needed to see from them during the tour’.<sup>28</sup> Ms Malone said that Ms Powell said words to the effect that ‘the selectors were very happy with how she was playing’. I accept that the meeting took place before the tour and, consequently, accept that it was as Ms Powell described it, rather than a simple commendation.

89. Ms Powell contended, and Ms Malone did not specifically dispute, that:
- a. the applicant was provided with match statistics showing ‘low outcomes’<sup>29</sup> after the Pro League matches in Antwerp; and
  - b. she was provided with feedback on 11 June 2024 in London, effectively repeating the message conveyed after the Pro League matches.
90. Ms Malone’s complaint assumes that the Panel, or at least Ms Powell, had formed the view that Ms Malone would not be nominated before the decision was made. It is not clear that that was the case. Ms Powell said she was in contention during the Teams European tour.<sup>30</sup> It is not clear from the Reasons that the applicant’s cause was hopeless. She finished in the middle of the outcomes per games ranking. She may have been selected if a different view was taken about the number of striker positions available.
91. The applicant stated that other members of the broader squad were aware beforehand that they were at risk or unlikely to be selected.<sup>31</sup> Ms Powell said that her conversations with those players were like the conversations she had with the applicant.<sup>32</sup> A number of the athletes who gave responsive witness statements indicated that they were in the same position. I do not consider that Ms Powell or the other coaching staff were required to specifically warn Ms Malone of the risk of non-nomination to be ‘fair’ to Ms Malone. Ms Malone would have been aware that there was a risk that she would not be nominated because she had been left out of the squad previously and the field was competitive.
92. I accept that Ms Malone was surprised that she was not nominated. I am not persuaded that the Ms Powell failed to adequately convey that the applicant was at risk of non-nomination. In any event, I am not satisfied that a failure to be sufficiently clear on this point is evidence of actual bias against Ms Malone.
93. The applicant referred to the fact that she was not selected for the team in 2023 and to her subsequent reinstatement as evidence of bias. I regard these matters as evidence that the Panel was *not* biased. Having decided to exclude Ms Malone, the Panel changed its mind. This shows that the Panel did not have fixed views and that it was prepared to alter its decision in light of subsequent events.
94. Finally, in considering the allegation of bias, it is relevant to bear in mind the circumstances in which the decision was made. Three of the four members of the Panel are Hockey Australia coaching staff. It must be anticipated that they will inevitably come to the task of selection with

<sup>27</sup> Applicant’s statement at [49], Powell’s statement at [34] and the applicant’s responsive statement at [10].

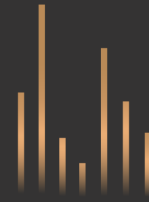
<sup>28</sup> Powell statement at [34].

<sup>29</sup> Powell statement at [35].

<sup>30</sup> Powell statement at [32].

<sup>31</sup> At [57].

<sup>32</sup> Powell statement at [37].



a history of dealing with the athletes vying for nomination. The Independent Chair has no doubt been nominated because of her long involvement with the game. The Chair would have been expected to be familiar with the athlete's performance before the selection meeting. The merits of all athletes would have been discussed by the Panel as a whole. There is no suggestion that the other members of the Panel were personally involved in conduct demonstrating bias against Ms Malone. It would be difficult in these circumstances for one member of the Panel to pursue a personal grudge against Ms Malone. Further, the members of the Panel may be taken to have a commitment to success of the team at the Olympics. In addition to the emotional commitment of the Panellists to the success of the team at the Olympics, the coaching members of the Panel might be seen as having a professional interest in the success of the team. It would not be in the interests of the Panel to deliberately select a sub-optimal team. These matters are relevant to assessing whether the conduct complained of by the applicant is sufficient to establish on the balance of probabilities that there was actual bias against the applicant.

95. The evidence provided by the applicant falls well short of establishing that the Panel was actually biased against her.

#### CONCLUSION

96. For the reasons given above, the applicant's challenges to her non-nomination are not made out.
97. As indicated above, the application was dismissed on 28 June 2024.

Date: 3 July 2024



Scott Ellis.