

Case number: NST-E24-216406

Case Title: Applicant v National Sporting Organisation

Determination

National Sports Tribunal General Division

sitting in the following composition:

Panel Member

Chris Ronalds AO SC

in the arbitration between

Applicant

(Applicant)

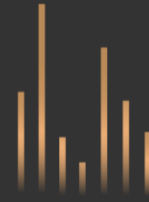
Represented by a legal representative

And

National Sporting Organisation

(Respondent)

Represented by a legal representative



PARTIES

1. Applicant (**the Applicant**) is a long time member of the National Sporting Organisation (**NSO, the Respondent**) and is also a member of the State Organisation (**SO**).
2. The Applicant has been described as:

For more than 20 years, he has been involved (on an unpaid basis) with both teaching and managing the operations of Sport 1 at a club, State and National level. He has held significant positions including, for example, being a member of the Sport 1 Board between 2012 and 2023 and being its chairperson between 2021 and 2023. During his appointment, the Applicant developed technical and safety guidelines for the Sport 1 community of the NSO and the SO, a state affiliate of the NSO.¹

3. The Respondent is a National Sporting Organisation recognised by the Australian Sports Commission and is the internationally recognised, governing body for Sport 1, Sport 2, Sport 3 and Sport 4 in Australia. Members of the Respondent compete locally, state, nationally and internationally and are eligible to attend international Sport 1, Sport 3 and Sport 4 seminars and grading exams. The Sport 1, Sport 3 and Sport 4 grading qualifications of NSO members are recognised internationally.

INTRODUCTION

4. By letter dated 15 November 2023, sent by email at 7.30 am, the Respondent advised the Applicant that their correspondence of 14 November 2023 “provided notification of a number of complaints to you regarding your alleged conduct”. Further:

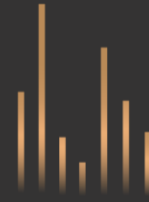
The Allegations within those Complaints have already been provided to you. The alleged conduct, if found to be substantiated, may amount to a breach of the NSO Member Protection Policy and the NSO Code of Conduct.

Please be mindful that no determination has been made about whether you have breached the Policy or not. The Complaints Process is designed to be impartial and consider all relevant information about the Complaint, Provisional Action is intended to mitigate risk and is not a punitive action.

5. The letter indicates that “the NSO has determined, on the basis of Independent Decision Maker’s assessment, that Provisional Action is required while the Complaint is being investigated” (**Provisional Action Letter**). Eight specific actions were set out, including that “Membership of NSO suspended until the outcome is made in any further complaint” (sic). The other actions included bans on attending specified meetings, training sessions, seminars, gradings or events.
6. An act of Provisional Action is based on clause 7.4 of the NSO Complaints, Disputes and Discipline Policy (**CDDP**), specifically clause 7.4(a), which provides:

Where an allegation suggests a risk of harm to a Participant which justifies imposing Provisional Action, the NSO will determine whether any Provisional Action will be taken to mitigate any potential harm to any person and/or interference in an investigation.

¹ Paragraph 9, Applicant’s Submissions.



NST JURISDICTION

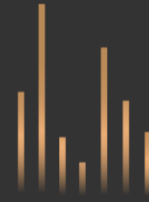
7. Section 23 of the *National Sports Tribunal Act 2019* (Cth) provides jurisdiction for this Tribunal in a dispute between a person and a sporting body, both as relevantly defined.
8. Pursuant to clause 7.4(d) of the CDDP, where Provisional Action is imposed on a person, then they may seek a review by this Tribunal.
9. It is noted that the CDDP commenced operation on 21 October 2023 and so was operative when the Provisional Action Letter was issued. While the complaints the subject of that decision covered acts and decisions allegedly occurring prior to 21 October 2023, that does not give rise to any invalidity of the Letter itself and the related decision. Those matters are open to review by this Tribunal within the operation of clause 7.4.²

FACTUAL BACKGROUND

10. There were earlier proceedings in the Tribunal involving the same parties which led to an Order made on 14 November 2023, as agreed by the parties:

The breach offer dated 28 August 2023 issued by the Respondent to the Applicant and the penalties and sanctions provided therein are void, invalid and otherwise of no effect.
11. That Order was sent by email to the parties from the Tribunal on 14 November 2023 at 4.35 pm.
12. The Respondent sent a letter to the Applicant on 14 November 2023 at 7.49 pm which set out some allegations from complaints made against him by various persons (**2023 Allegations Letter**).
13. The Applicant sent letters to the Respondent dated 16, 22, 29 and 30 November 2023.
14. On 1 December 2023, the Respondent sent a letter to the Applicant which stated that it rejected all of the preliminary matters he had raised in his earlier correspondence and requested a response to the 2023 Allegations by 14 December 2023.
15. A letter from the Applicant responding to the 2023 Allegations letter was dated 7 December 2023 and sent to the Respondent on 8 December 2023 at 8.25 am (**Applicant's 2023 Response**).
16. On 28 January and 11 February 2024, the Applicant sent emails to the Respondent requesting that it determine the 2023 Allegations.
17. On 24 February 2024, the Respondent responded by acknowledging the response but stating that it was unable to accept the response as it appeared that the Applicant was still disputing the process undertaken by the Respondent.
18. On 26 February 2024, the Applicant responded and claimed that he had responded to the 2023 Allegations and that the latest Respondent letter was a refusal to determine those Allegations. He advised of his intention to apply to the Tribunal.
19. On 26 February 2024, the Applicant lodged his 2024 Application to this Tribunal which constitutes in part the Application that is addressed in this Determination (**2024 NST Application**).

² See paragraph 30, Applicant's Submissions.



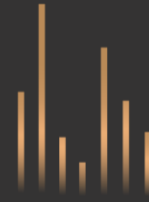
20. On 24 March 2024, the Respondent issued correspondence to the Applicant which set out further complaints made against him and requested a response by 21 April 2024 (**2024 Allegations Letter**).
21. On 10 April 2024, the Applicant formally responded to the Respondent in relation to the 2024 allegations (**Applicant's 2024 Response**).
22. By letter dated 19 June 2024, the Respondent advised the Applicant that the allegations made against him had been referred to an Internal Hearing Tribunal under clause 7.2(d) of the CDDP. That letter advised that "it is endeavoured that this matter will be heard within the next 2-4 weeks, depending on the Tribunal Members' availability". Further, the letter advised:

Please be advised that no determination has been made about whether you breached the policies or not. The complaints process is designed to consider all relevant information about the allegations and make a determination on whether there has been a breach of policy.
23. While the Member has considered all the facts, allegations, legal arguments and evidence submitted by the parties she refers in her Determination only to the submissions and evidence she considers necessary to explain her reasoning.

PROCEEDINGS BEFORE THE NST

24. As part of the amended draft Arbitration Agreement, which was not executed by the parties, the following Procedural Directions were set out in clause 9 and agreed and mostly complied with:
 - 1.1 **Respondent** to file with the NST Registry and serve on the Applicant by 5pm (AEST) 29 May 2024:
 - a) Material in accordance with clause 8.3 of this agreement;
 - b) written submissions;
 - c) any statements of evidence upon which they intend to rely; and
 - d) all other documents on which they intend to rely.
 - 1.2 **Applicant** to file with the NST Registry and serve on the Respondent by 5pm (AEST) 5 June 2024:
 - a) written submissions;
 - b) any statements of evidence upon which he intends to rely; and
 - c) all other documents on which he intends to rely.
 - 1.3 **Respondent** to file and serve by 5pm (AEST) 7 June 2024:
 - a) written submissions in reply; and
 - b) any statements of evidence in reply.
25. By email dated 6 June 2024, the lawyers representing the Respondent wrote:

We refer to the timetable set at present requiring us to file Reply Submissions by 7 June 2024.



We note that Applicant is the Applicant in this matter, we first became aware of the basis on which his application to revoke his provisional suspension was based yesterday, 5 June 2024. His arguments were contained in a 30 page submission plus numerous additional annexures.

We note that when we filed our preliminary submissions on 29 May 2024, we reserved our rights to make more substantive submissions and put on evidence.

In all the circumstances, we submit that our deadline to file Reply material be moved to 12pm on Tuesday 11 June 2024. Otherwise, proper submissions, arguments and evidence will not be able to be put. We note that Applicant had almost 2 weeks to formulate his submissions and had our submissions for a full week. We have only had his submissions for 1 day.

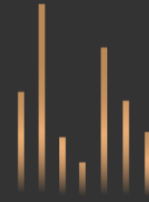
26. After further exchanges, the Respondent filed Reply Submissions on 12 June 2024.
27. The relevant documents were filed:
 - a. the Respondent's Submissions dated 29 May 2024 with 9 paragraphs (**Respondent's Submissions**),
 - b. the Applicant's Submissions dated 5 June 2024, titled "Outline of Submissions" with 136 paragraphs (**Applicant's Submissions**),
 - c. the Respondent submissions dated 12 June 2024 with 55 paragraphs (**Respondent's Reply Submissions**).
28. In anticipation of the hearing of the Application, on 20 June 2024, the Applicant filed a Bundle of Documents List and a zip file with all the documents and authorities on which it sought to rely. No objection was taken by the Respondent and this Bundle was referred to during the hearing.
29. A hearing was conducted on 21 June 2024. Both the Applicant and the Respondent were legally represented and the hearing ran for 2.5 hours. No evidence was called and consequently there was no cross-examination of any witnesses and only submissions from both parties were made.
30. No objection was made at the outset of the hearing process to the composition of the Panel and at the conclusion of the hearing on 21 June 2024, the parties confirmed that their procedural rights had been fully respected.

APPLICABLE RULES

31. In relation to the hearing and determination of these proceedings, the critical rule is clause 7.4(d) of the CDDP which provides:

If a decision is made to impose Provisional Action, a Respondent³ may seek to have that decision reviewed by a Hearing Tribunal. The Hearing Tribunal will only consider whether the decision to impose the Provisional Action is proportionate to the perceived risk of harm and will not consider the merits of the Complaint except as is necessary to assess proportionality.

³ Noting that this refers to the Applicant in these Proceedings.



32. Clause 7.4(c) of the CDDP provides:

Provisional Action may include suspension, supervision, restriction of duties or temporary redeployment, or suspension or restrictions of rights, privileges or benefits.

MAIN SUBMISSIONS OF THE PARTIES

33. The primary submission of the Applicant is that the Provisional Action was “grossly disproportionate, manifestly unfair and was otherwise made contrary to law”.⁴ Further, the Applicant contends:

The terms and effect of the Provisional Action were, and have been, to suspend all of Applicant’s rights and entitlements as a member of the NSO. Consequently, the decision to make and implement the Provisional Action constitutes a decision which affected and continues to affect his “*rights, interests and legitimate expectations*”. Accordingly, the NSO and its delegate, Independent Decision Maker, owed Applicant a common law duty to afford him procedural fairness...

Although the NSO is not a court or tribunal, the CDDP expressly gives the NSO certain powers and procedures which are typical of a court or tribunal. Consequently, in exercising those powers, the NSO’s processes cannot be used in a manner which is unjust or unfair. This prohibition is, again, confirmed both by the terms of clause 4.3(a) and 9.1(d) of the CDDP and is otherwise consistent with, for example, clause 7.5(d) of the CDDP; clause 7.1 of the MPP; and clauses 1.1 and 4(e) and (f) of the Code.⁵

34. The Applicant identifies six alleged flaws in the decision-making process of the NSO leading to Provisional Action.

35. The alleged first flaw is a detailed analysis of the relevant material on the basis of an alleged apprehension of bias, in particular by the Independent Decision Maker and the NSO National Complaints Manager from their earlier roles in the First Independent Decision Maker Report dated 6 August 2023 and the Breach Offer issued by the NSO on 28 August 2023 and signed by the NSO President. The Applicant asserts that as the complaints manager, the NSO National Complaints Manager, “must have been actively involved in its preparation and issue”.⁶ He further claims that this involvement led to an apprehended impartiality and prejudice when involved in the Second Independent Decision Maker Report dated 10 November 2023, the 2023 Allegations Letter and the Provisional Action Letter itself.

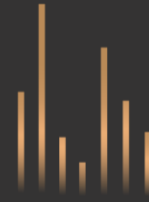
36. The alleged second flaw is identified as the alleged failure to allow the Applicant to respond at any time prior to the issue of the Second Independent Decision Maker Report and the allegations made against him which were considered in relation to the decision to issue the Provisional Action.

37. The alleged third flaw is identified as the alleged failure to give proper reasons. The alleged fourth flaw is that the Provisional Action was not warranted. The alleged fifth flaw is that there was no

⁴ Paragraph 2, Applicant’s Submissions.

⁵ Paragraphs 34 and 39, Applicant’s Submissions.

⁶ Paragraph 51, Applicant’s Submissions



explanation of the purported need for provisional action. The alleged sixth flaw is the alleged unacceptable delay in determining the 2023 Allegations.

38. The Respondent's Reply Submissions are the more substantive submissions and respond directly to the Applicant's submissions.

39. The Respondent contends:

To the extent that the Applicant seeks to impeach the legality of the Provisional Action outside the scope of clause 7.4(d), for example by asserting that the imposition of, and maintaining of the Provisional Action did not accord with procedural fairness or was accentuated by bias, then that is a matter for the Applicant to pursue in another forum, with reliance upon other clauses etc. The Applicant would likely be met with difficulties in establishing the necessary actual bias, which is not demonstrated on the materials in this application – although that is not a matter which the NST is required to deal with in this application... The NST's test and jurisdiction in this application is as set out in clause 7.4(d) and that is the only matter for determination within this application.⁷

40. Further, the Respondent contends:

The only question for the NST to determine in this clause 7.4 application is:

(a) *Is the decision to impose the Provisional Action proportionate to the perceived risk of harm [as perceived by NSO]?*

In determining the answer to that question, the NST may only consider the merits of the 'Complaints' (not other matters relevant to the ultimate outcome of the allegations) as is necessary to determine proportionality [that is whether or not the Provisional Action is *proportionate* to the perceived risks of harm].⁸

MERITS

41. Various different issues arise in relation to the consideration of the Provisional Action.

42. An initial consideration is the actual letter itself which advised the Applicant of the Provisional Action. That letter was issued on 15 November 2023 and if these proceedings were being conducted closer to that date, then that may have been the only proper consideration. However, given the passage of time, a second issue arises from the significant period of time that the Provisional Action has continued to be in place until the date of this Determination in late June 2024.

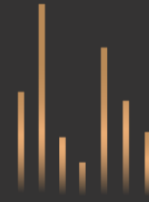
43. One preliminary consideration is in determining whether an action is proportionate, the consideration is whether it is "necessary for the purpose it serves".⁹

44. Provisional Action is not supposed to be or designed as a form of punishment. It supposedly exists in order to mitigate the risk of harm to an individual, or interference with an investigation, pending the finalisation of a complaint (clause 7.4 CDDP). Therefore, the purpose that the Provisional Action serves is to prevent prejudice to the finalisation of a complaint. In determining

⁷ Paragraphs 12 and 13, Respondent's Reply Submissions.

⁸ Paragraphs 19 and 20, Respondent's Reply Submissions.

⁹ *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 351 (French CJ).



whether the Provisional Action is disproportionate, it is required to consider whether it is necessary for the purpose of preventing prejudice to the finalisation of a complaint.

45. In relation to the first issue of the contents of the Provisional Action Letter, the CDDP provides that Provisional Action may be taken “where an allegation suggests a risk of harm which justifies imposing Provisional Action” (clause 7.4(a)). Therefore, not all allegations involving a risk of harm will result in Provisional Action. Provisional Action may only be imposed in respect of those allegations which relate to a risk of harm that is *sufficiently serious as to justify* imposing Provisional Action.
46. The notification of the Provisional Action provided to the Applicant did not specify the risk of harm which was alleged to be sufficiently serious as to justify the Provisional Action. While it is correct that the notification referred to the Complaint itself, it did not specify the actual risk of harm. This is plainly inadequate.
47. While the Respondent has contended that procedural fairness does not apply to the decision under review¹⁰, the Tribunal rejects that assertion as being without proper foundation. The Tribunal finds that the NSO was required to comply with procedural fairness in making the decision to impose the Provisional Action due to the potential outcomes in clause 7.4(c) of the CDDP and the actual outcomes imposed.
48. Procedural fairness requires that a person is given adequate particulars of the nature of the charge which has been made. While the content of the notification may vary depending on the nature of the inquiry,¹¹ it must convey those particulars with reasonable clarity. In *Gribbles Pathology (Vic) Pty Ltd v Cassidy*,¹² Weinberg J stated:¹³

The recipient should not have to strain for a meaning or be left in confusion as to what was intended. Vague allegations, drafted with imprecision and lack of specificity, may constitute a denial of natural justice and lead to the conclusion that an inquiry has been conducted without jurisdiction or authority.

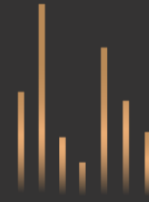
49. This is such an occurrence. While the Provisional Action referred to the complaint, it is not possible to discern the precise risk that is alleged to be sufficiently serious as to justify the Provisional Action without having to “strain for a meaning”. This amounted to a denial of procedural fairness for two reasons. First, without being aware of the particulars of risk that purportedly gave rise to the Provisional Action, the Applicant was unable to meaningfully exercise his right of review under clause 7.4(d). Secondly, the Applicant was denied a reasonable opportunity to be heard in the course of any investigation, as required under clause 7.5(b). Indeed, the requirement in clause 7.5(b) that the rules of procedural fairness will apply to an investigation is meaningless if the Applicant is not aware of the risk of harm which is said to arise from the allegation.
50. The Applicant was denied procedural fairness in the issuing of the Notice, with the consequence that he could not meaningfully exercise his right of review or participate in the subsequent investigation. It follows from this fundamental breach of his rights that the Provisional Action was

¹⁰ See paragraph 12, Respondent’s Reply Submissions.

¹¹ *Traill v McRae* (2002) 122 FCR 349 at [134] (per Sackville, Kenny and Allsop JJ).

¹² (2002) 122 FCR 78.

¹³ At [143].

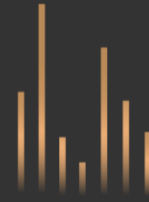


invalid from the date of issue. However, in the absence of its withdrawal or revocation by the NSO or any order to that effect by any court or tribunal with the required jurisdiction, it has continued to operate to the significant detriment of the Applicant. This timing and impact must necessarily be accepted and recognised in any order to be made in these proceedings. Therefore, the Tribunal's finding is that the Provisional Action is invalid and of no effect from the date of this Determination.

51. In other words, and adopting the language of Clause 7.4, the Provisional Action is disproportionate to the risk of harm, as it is not necessary for the purpose it serves. This is because it does not adequately disclose the way in which it is alleged that it relates to *any* asserted risk of harm.
52. The second issue provides a separate basis for concluding the Provisional Action is invalid. The significant passage of time that has passed since the Provisional Action was determined is contrary to the intention that it is an interim measure pending the outcome of the complaint and any related investigation that purportedly provides the foundation for the determination of the Provisional Action.
53. By its nature, Provisional Action is temporary and exists in order to prevent prejudice to the finalisation of a complaint: either through harm to a person, or interference in an investigation, until a matter is finalised. So much is clear from the terms of clause 7.4(a) of the CDDP. The Provisional Action was taken in November 2023. Part 7 of the Policy sets out the various steps that may be taken in order to finalise a complaint: referral to a Hearing Tribunal, Investigation or Alternative Dispute Resolution. None of these steps have been taken in the present case until the challenge to the Provisional Action was a live issue before this Tribunal. The consequence is that the Provisional Action has continued for a period of over seven months.
54. The CDDP contains no express time limits for the conduct of an investigation or the finalisation of a complaint. Where there is no explicit time limit for the making of a decision, there is an implied duty to do so "within a reasonable time".¹⁴ What amounts to a reasonable time is ultimately a question for this Tribunal to determine, having regard to whether a reasonable person would consider the delay justified and not capricious.¹⁵
55. In oral submissions, the Respondent contended that there was no delay and that this was not an issue for the Tribunal to consider as the matter had proceeded in a timely fashion including a period of a month for a Christmas break period. This submission is not accepted as being reasonable and there was no proper factual matrix presented to sustain or support such a proposition. A review of all relevant dates since 15 November 2023 does not sustain such a contention.
56. In relation to the 2023 Allegations Letter, the Applicant submitted his 2023 Response on 8 December 2023. There has been no response to the substance of that Response from the Respondent since that date, that is, a period of over six months. The allegations raised serious

¹⁴ *Plaintiff S 297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179, 189-190 [37] (Crennan, Bell, Gageler and Keane JJ); *ASP15 v Commonwealth of Australia* (2016) 248 FCR 372 at [20]-[23] (Robertson, Griffiths and Bromwich JJ).

¹⁵ *ASP15 v Commonwealth of Australia* (2016) 248 FCR 372 at [20]-[23] (Robertson, Griffiths and Bromwich JJ), citing with approval *Thornton v Repatriation Commission* (1981) 52 FLR 285, 292 (Fisher J).



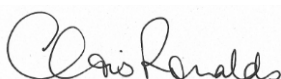
issues which needed to be addressed promptly by the Respondent for all persons involved, including but not limited to the Applicant. This has not occurred.

57. In relation to the 2024 Allegations Letter, it was provided to the Applicant on 24 March 2024 and his Response was submitted to the NSO on 10 April 2024. These allegations raised serious issues also, including some overlap, with no response from the Respondent for almost three months.
58. It is not to the point that the NSO is a members' organisation with all roles performed on a voluntary basis. If it is to engage in serious disciplinary matters and hold itself as doing so under the National Integrity Framework, then it must be able to meet the fundamental legal requirements for all persons involved in the system.
59. In effect, the Provisional Action was taken with a significant detriment to the membership and reputation of the Applicant and the Respondent then took no action at all apart from an occasional letter for a period of eight months since the process commenced on 14 November 2023. There was an earlier period of detriment caused to the Applicant which commenced on 6 August 2023 with the First Independent Decision Maker Report and continued on with no effective NSO action until the NST Orders on 14 November 2023.
60. In the present case, the delay in conducting an investigation or otherwise finalising the Complaint is not justified and is not reasonable, in circumstances where it has prevented the Applicant from participating in his sport and in the administration of his sport. As such, the NSO has failed to take steps that it is required, under the CDDP, to take: namely the finalisation of the Complaint (whether through investigation or otherwise).
61. The NSO has not demonstrated that the Provisional Action, which was apparently imposed in order to prevent prejudice to the finalisation of the Complaint, is still required in circumstances where they have taken no steps to actually progress the investigation of the complaint until 19 June 2024, and then only apparently in response to these proceedings. It follows that the Provisional Action is no longer proportionate to the perceived risk of harm (if indeed it ever was).
62. Therefore, the Tribunal finds that there is no identified basis for the Provisional Action to continue to operate and hence it is invalid and of no effect from the date of this Determination.
63. Having determined that the Provisional Action is invalid, there is no need to consider the other submissions made by the Applicant relating to bias or lack of explanation

THE TRIBUNAL THEREFORE DETERMINES:

1. *The Provisional Action imposed on the Applicant on 15 November 2023 is invalid and of no effect from the date of this Determination, that is, 26 June 2024.*

Date: 26 June 2024



Chris Ronalds AO SC