

NST-E24-287345

Jackson Love v Athletics Australia

Determination

National Sports Tribunal General Division

sitting in the following composition:

Panel Member Professor Jack Anderson

in the arbitration between

Jackson Love *(Applicant)*

Supported by Robert and Tracey Love (parents)

And

Athletics Australia *(Respondent)*

Represented by Scott Traeger, Lander & Rogers, Legal Representative

Bronte Douglas-Scrafe, Lander & Rogers, Legal Representative

And

Peter Hamilton, Chair of Athletics Australia Selection Panel

Interested Party 1 (IP1) *(Interested Party)*

Represented by [REDACTED]

Interested Party 2 (IP2) *(Interested Party)*

Represented by [REDACTED]

Interested Party 3 (IP3) *(Interested Party)*

Represented by [REDACTED]



PARTIES

1. The Appellant, Jackson Love, (**the Appellant or non-nominated athlete**) is an athlete who seeks to represent Australia at the 2024 Paralympic Games in Paris (**the Games**) in the T35 200m event.
2. The Respondent, Athletics Australia, (**the Respondent or AA**) is the national sporting organisation for the sport of Athletics in Australia.
3. The Interested or Affected Parties, IP1 (■■■■, ■■■■), IP2 (■■■■, ■■■■) and IP3 (■■■■, ■■■■) (**the Interested or Affected Parties or nominated athletes**) are athletes who have been nominated to represent Australia at the Games. Two other nominated athletes, ■■■■ (■■■■), ■■■■ (■■■■, ■■■■), were joined as parties to this arbitration. Their nominations were not challenged by the Appellant.

INTRODUCTION

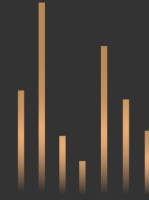
4. The Appellant appeals (**the Appeal**) a decision by the Respondent notified to the Appellant on 1 July 2024 not to nominate him for the Games. The decision by the Respondent had been made via an AA Selection Committee operating under the Athletics Australia Nomination Policy - 2024 Paralympic Games, Paris, France (**AA Nomination Policy**).
5. The selection process from the Australian Paralympic Team in the sport of Para Athletics at the Games consists of a number of steps:
 - (i) Australia must earn quota spots pursuant to the Paris 2024 Paralympic Games Qualification Regulations (**Qualification Regulations**) – Australia earned 15 quota spots for male athletes at the Games;
 - (ii) nominated athletes must meet the eligibility requirements of section 9 of the Qualification Regulations – it is not in dispute that the Appellant and Interested Parties meet the section 9 eligibility criteria;
 - (iii) the nominated athletes must be nominated by AA pursuant to clause 5 of the AA Nomination Policy for selection by Paralympics Australia (**PA**); and
 - (iv) PA must select the athlete to be part of the Australian Team for the Games.
6. This matter centres on the step described at para [5] (iii) above. That step has two phases: Phase 1 (Initial Nomination) occurred in April 2024, during which 5 male athletes were nominated by AA; and Phase 2 (Final Nomination) therefore consisted of the assessment of who should fill the ten (10) remaining quota slots.
7. On 30 June 2024, AA's Selection Committee determined the ten (10) athletes which, among their number, included the Interested Parties but not the Appellant.
 - IP3 – ■■■■ ■■■■ ; ■■■■
 - IP2 - ■■■■ ■■■■ ■■■■ ;
 - IP1 - ■■■■ ■■■■ .



8. On 2 July 2024, the Appellant filed an application with the National Sports Tribunal (**NST**), challenging his non-nomination.
9. Pursuant to clause 1.7 of Appendix 2 of the AA Nomination Policy (or more fully, clause 1.7 of Appendix 2: Appeals Process, of the Athletics Australia 2024 Paralympic Games Nomination Appeals Procedure Regulation), the available grounds of appeal are threefold:
 - (a) *a nominated athlete whom the Appellant seeks to replace does not meet the Athlete Eligibility Criteria (clause 1.7(a));*
 - (b) *the Appellant's omission from the Team was otherwise a result of a failure by the Selectors to properly apply the Nomination Criteria set out in the Policy (clause 1.7(b)); and*
 - (c) *there were no grounds on which the Nomination decision could reasonably be based (clause 1.7(c)).*
10. The Appellant's application was brought on the grounds set out in clauses 1.7(b) and 1.7(c).

NST JURISDICTION

11. Pursuant to section 13 of the National Sports Tribunal Act 2019 (**NST Act**), the presiding member has been appointed by the Minister by written instrument as a Member of the Tribunal, and pursuant to section 24 of the National Sports Tribunal (Practice and Procedure) Determination 2021 (**NST Determination**), was appointed by the CEO of the Tribunal to conduct this arbitration under section 23 of the NST Act in the General Division of the Tribunal.
12. Pursuant to section 16(1) of the NST Act and rule 6 of the National Sports Tribunal Rule 2020, a Tribunal member is obliged to notify the CEO of the Tribunal of any conflict of interest in a matter to which he or she is appointed. There is no such interest to be notified in this case.
13. The jurisdiction of the National Sports Tribunal to hear and determine the present dispute arises pursuant to section 23 of the NST Act which provides that where a dispute arises between a person bound by one or more constituent documents by which a sporting body (in this case the Respondent) is constituted, and one or more of those documents permit the dispute to be heard in the General Division of the National Sports Tribunal, the person (in this case the Appellant) may apply to the Tribunal for arbitration of the dispute.
14. As stated in paragraph [9] above, the Appellant appeals pursuant to clause 1.7(b) and (c) of the AA Nomination Policy. As per clause 1.1 of the AA Nomination Policy, any arising Appeal must be conducted by the NST.
15. Section 40 of the NST Act sets out general principles applicable to NST arbitration as follows:
 - (1) *In the arbitration:*
 - (a) *the procedure of the Tribunal is, subject to this Act, within the discretion of the Tribunal;*



(b) the arbitration must be conducted with as little formality and technicality, with as much expedition and at the least cost to the parties as a proper consideration of the matters before the Tribunal permit; and

(c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate.

(2) The parties must act in good faith in relation to the conduct of the arbitration.

16. In addition, section 28 of the NST Determination provides that the Tribunal may inform itself in arbitration in a variety of ways. Most importantly, the Tribunal is not bound by the rules of evidence.

17. Section 52 of the NST Determination states that a Tribunal may determine dispute without a hearing:

(1) Where the Tribunal considers it appropriate to do so and all the involved parties to the dispute agree, the Tribunal may determine the dispute without a hearing.

(2) The Tribunal is to act in accordance with the terms of the relevant constituent document or agreement for the resolution of the dispute.

18. As is their right, and in line with section 52(1) of the NST Determination and clause 1.9 of the AA Nomination Policy, the Appellant sought and was granted an oral hearing.

PROCEEDINGS BEFORE THE NST

19. The Appellant filed an application to the NST on 2 July 2024. On 10 July, the Member was allocated this matter and on verification of the Member's declaration of no conflict of interest in this matter, the NST Registry supplied the Member with the Appellant's application form and the AA Nomination Policy.

20. On 9 July 2024, the Parties had been directed as follows (**the Directions**):

- On or before Wednesday, 10 July 2024 at 12pm AEST, the Applicant must give to the Tribunal and all other parties any written submissions and evidence on which he intends to rely.
- On or before Thursday, 11 July 2024 at 12pm AEST, the Respondent must give to the Tribunal and all other parties: any written submissions and evidence on which it intends to rely; and written advice of whether it consents to this appeal being determined on the papers.
- On or before Thursday, 11 July 2024 at 4pm AEST, all Interested Parties must give to the Tribunal and all other parties: any written submissions and evidence on which they intend to rely; and written advice of whether they consent to this appeal being determined on the papers.
- On or before Thursday, 11 July 2024 at 10pm AEST, the Applicant must give to the Tribunal and all other parties: any written submissions and evidence in reply; and written advice of whether he consents to this appeal being determined on the papers.
- A video hearing (if required) will be held on Friday, 12 July 2024.



21. The Parties abided by the above Directions and otherwise greatly assisted the Member in the running of this matter and for which the Member is grateful.
22. A hearing (via Teams) was held at 2pm (AEST) on 12 July at which all the Parties attended and/or were represented, save IP2.
23. As determined at the oral hearing, the Member communicated his short-form Determination to the NST Registry, for dissemination to the parties, on Saturday 13 July 2024. A summary of that short form Determination is as below:

Dear Parties

I refer to the matter of Jackson Love v Athletics Australia [NST- E24-287345] which had an oral hearing on 12 July 2024. Having read and considered the written submissions made by the parties in advance of the hearing; having reflected overnight on the final oral submissions made by the parties; the Member has determined that the appeal should be dismissed i.e., that the grounds of appeal (made by Mr Love pursuant to clause 1.7(b) and (c) of Appendix 2: Appeals Process, of the Athletics Australia 2024 Paralympic Games Nomination Appeals Procedure Regulation) have not been made out. A full reasoned award will be made available to the parties on Monday, 15 July 2024. Pursuant to clause 1.14 of the above Nomination Procedure, the decision of the Tribunal is binding on the parties and no further appeal, including to CAS, shall be allowed.

24. This Determination is the full reasoned award noted in paragraph [23].

FACTUAL BACKGROUND

25. In reaching this Determination, although the Member has considered all the facts, allegations, legal arguments, and evidence submitted by the parties, he refers in his Determination only to the submissions and evidence he considers necessary to explain his reasoning. Unless otherwise attributed, the quotations noted in the section below – main submissions of the parties – are taken directly from the Parties’ respective written submissions.
26. At this point, it must also be reiterated that central to this matter is the interpretation of clause 5 of the AA Nomination Policy and specifically (but not exclusively) clause 3 (Nomination Aims); clause 5.2 (Nomination Standards); 5.4 (Nomination Criteria); and 5.6 (Phase 2 – Final Nomination) of the AA Nomination Policy, which are replicated below:

3. Nomination Policy Aims

Athletics Australia aims to facilitate the following outcomes through the nomination of athletes for the Paralympic Games:

3.1 Send a team capable of realising Australia’s vision of being a Top 5 Nation at Benchmark Events;

3.2 Nominate athletes with the realistic potential to win a gold medal or finish in the top three at the Competition;



3.3 Nominate athletes who are considered capable of a gold medal or podium finish in future Paralympic Games and World Para Athletics Championships.

3.4 In all cases, the Selection Committee will consider each athlete's competitive record and demonstrated ability to plan the peak of their season at a major championship.

...

5.2 Nomination Standards

Nomination Standard Performances (referred to below as Standards): Consistent with this strategy, and in accordance with previous Athletics Australia nomination strategies for Paralympic teams, Athletics Australia has developed Athletics Australia A ("AA A") and Athletics Australia B ("AA B") Standards for this policy. "AA A" and "AA B" Standards are available in Appendix 1 of this document. The WPA Qualification Standards are the minimum qualification entry standards for all events, however nomination will be in accordance with the Standards set out in Appendix 1.

If necessary, due to increased depth or performance internationally, these Standards may be adjusted up until June 1 2024, in line with Section 8 of this policy. Should this be required the policy will be amended accordingly and communicated through the Athletics Australia website (www.athletics.com.au).

5.2.1 In order for a Standard to be recognised as an official performance, it must be achieved at one of the following levels of competitions:

5.2.1.1 World Para Athletics Approved Competitions

5.2.1.2 World Para Athletics Endorsed Competitions

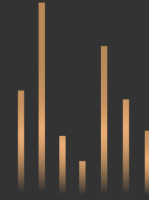
5.2.1.3 World Ranking Competitions

5.2.1.4 Athletics Australia Domestic Permit Competitions

**If an athlete's Standards are not achieved at a WPA Approved or WPA Endorsed competition, they must have achieved one WPA Minimum Entry Standard (listed in appendix one) at a WPA Approved or WPA Endorsed competition to be eligible for nomination.*

5.2.2 Standards achieved in mixed events, will only be accepted under the following circumstances:

5.2.2.1 For all field events held completely in the stadium the results will be automatically accepted if achieved at WPA sanctioned events, and the two events (Men's and Women's) were conducted concurrently with separate results; and



5.2.2.2 *For mixed gender stadium competition in races of 5000m or greater if achieved at WPA sanctioned events, only when there are insufficient athletes of one or both genders competing to justify the conduct of separate races. The gender of each athlete shall be shown in the result. Such races should not, in any case, be conducted so as to allow athletes of one gender to be paced/drafted or assisted by athletes of another gender.*

5.2.2.3 *Never accepted for all other track events*

5.2.3 *For the purposes of this Nomination Policy, performances in a single event in any single competition, will only be counted as a single Standard e.g. only one performance from the heat or final, qualifying round or final, or a field event series. For clarity the best performance from that specific event will be the single and only Standard for consideration by the Selectors from that event.*

5.2.4 *Wind assisted Standards shall not be accepted. Outdoor Standards in 100m, 200m, and Long Jump must be accompanied by wind gauge readings. For 100m, 200m and Long Jump Standards the wind reading must not exceed the allowance provided for in the rules of the governing body of the Competition (2.0m/s).*

5.2.5 *Hand-timed Standards for events up to and including 800m will not be accepted.*

5.2.6 *Indoor Standards for all field events and for races of 400m and longer, will be accepted.*

5.2.7 *For the running events of 200m and over, Standards achieved on over-sized tracks will not be accepted.*

...

5.4 Nomination

5.4.1 *To be eligible for consideration by the Selectors for nomination an athlete must achieve any of the following (listed in order of highest to lowest seeding):*

- *Two (2) (or more) "AA A" Standards* in a single/same event*
- *One (1) (or more) "AA A" Standard for marathon events*
- *One (1) "AA A" Standard* and One (1) "AA B" Standard* in a single/same event*

5.4.2 *Athletes who achieve the below criteria, in no particular order of priority, will be considered for any remaining quota slots after 5.4.1 has been applied:*

- *Achieved a top six (6) finish in the Final at the 2023 WPA Championships (so long as that performance is above 50% of the total competing field size), in an event on the 2024 Paralympic Program AND achieved the WPA High Performance Standard* in the same event.*



- Athletes who are yet to compete at a Paralympic Games and have made a final OR finished in the top 50% of the field at a Senior WPA Championships that are considered medal capable for the 2028 Paralympic Games

- Two (2) (or more) “AA B” Standards* in a single/same event

- One (1) (or more) “AA B” Standard for marathon events

* For all athletes seeking nomination (marathon excluded), at least one (1) Standard must be achieved between 01 January, 2024 and 28 June, 2024.

5.4.3 Athletes who achieve the below criteria, will be considered for any remaining quota slots after 5.4.1 and 5.4.2 has been applied:

- Achieved the WPA High Performance Standard within the Athletics Australia Qualifying Period (5.3) AND

- Demonstrated year on year performance progression in the event in which the athlete has achieved the WPA High Performance Standard.

...

5.6 Phase 2 – Final Nomination

5.6.1 Subject to the rules of the governing body of the Competition relating to the number of athletes who may be nominated for each medal event and for the Team overall, the Selection Committee may exercise discretion to Nominate further athletes to the Team. This discretion will be exercised in line with the Aims of this policy. This discretion is absolute and need not be exercised.

5.6.2 Subject to each athlete meeting all eligibility requirements set out in this Nomination Policy, the following athletes will be eligible to be Nominated in the final Nomination phase for the Competition:

5.6.2.1 Any athlete who has achieved the minimum number of Standards as set out in 5.4.1, 5.4.2 and 5.4.3

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

5.6.2.2 Potential to win a medal at the 2024 Paralympic Games,

5.6.2.3 Potential to win a medal at the 2025 WPA Championships,

5.6.2.4 Potential to win a medal at the 2028 Paralympic Games.



5.6.2.5 *The number of “AA A” Standards (i.e. multiple “AA A” Standards are better than a single “AA A” Standard, a single “AA A” Standard is better than multiple “AA B” Standards),*

5.6.2.6 *History of performances at either the 2020 Paralympic Games or 2019 and 2023 World Para Athletics Championships with particular reference to the final position achieved by Athletes in individual events and their performances compared to the Standards on which they were Selected for those events,*

5.6.2.7 *History of performance or equivalent at other international competitions or World Para Athletics (domestic or internationally sanctioned) events against the relevant Standards,*

5.6.2.8 *Quality and consistency of performances throughout the Qualification Period,*

5.6.2.9 *Recent form and fitness.*

MAIN SUBMISSIONS OF THE PARTIES

Appellant

27. The gravamen of the Appellant’s written submissions (re-emphasised at the oral hearing) was that the methodology used by the AA Selection Committee to nominate the Interested Parties was so statistically inconsistent and flawed in comparative approach that it was not unreasonable to hold there was no evidence or other material to justify the making of the decision not to nominate the Appellant – the clause 1.7(c) ground of appeal. And further, such was the unreasonableness of the AA Selection Committee’s decision that it logically followed that they had improperly applied the relevant nomination criteria – the clause 1.7(b) ground of appeal.
28. At the oral hearing, the Member asked the Appellant (who was eloquently and impressively represented by his parents), to expand, not on why the three Interested Parties ought not be nominated, but, more positively, on what grounds ought the Appellant be nominated. The Appellant answered the question comprehensively and noting in particular that the Appellant’s rate of recent improvement in his event was of marked exponential improvement both of itself and in comparison to the three Interested Parties.

Respondent

29. The Respondent’s submissions (principally of 11 July but also at oral hearing) were, in brief, that with respect to clause 1.7(c) (no grounds on which the decision could reasonably be based) should be rejected because:
- (i) The evidence was that there were cogent and compelling reasons for nominating the Interested Parties and for not nominating the Appellant, and that those reasons were the product of a considered synthesis of the aims and requirements of the AA Nomination Policy, each athlete’s relevant performance and the more general consideration relating to athletes’ likelihood of achieving a medal winning performance at the Games, or at future Paralympic Games or World Para Athletics



Championships – see in particular the Respondent’s written submissions of 11 July 2024 at paragraphs [74]-[77].

- (ii) At the oral hearing, the Respondent’s Legal Representative also highlighted that the ground of appeal referred to “no” grounds on which the decision could be reasonably be based i.e., that even if the Member was of the view that not all of the grounds upon which the AA Selection Committee’s decision was based were reasonable in nature; if there was some identifiable grounds to demonstrate that the ultimate decision was reasonable or, at least, not irrational, that would suffice to dismiss this ground of appeal. In this, the Respondent made the point that the threshold over which the Appellant must cross in relation to this ground of appeal was, as it would be in general administrative law, quite high.

30. With regard to the other ground of appeal – clause 1.7(b) of the Nomination Policy (failure to properly apply the nomination criteria), the Respondent carefully went through the process by which each of the three Interested Parties were nominated, and illustrating, by reference to the nomination process as a whole (noted in paragraph [5]) above), how and on what basis each Interested Party had been chosen by way of the proper and strict application of the various nomination criteria and policy.

31. The Respondent’s written submissions in this regard were supported by a comprehensive affidavit by the Chair of the Selection Committee, explaining the process and the rationale of the AA Selection Committee pertaining generally to all eligible athletes, to each of the Interested Parties and specifically to the Appellant. The affidavit built upon the explanation provided by the Chair of the AA Selection Committee to the Appellant by way of a formal non-nomination letter on 1 July and more informally by email on 2 July.

MERITS

32. The essence of the Appellant’s case is based on a comparison of performance data between him and each of the three Interested Parties and how flaws in that comparative methodology support the purported grounds of appeal. For reasons both of confidentiality and succinctness, the Member does not again outline the comparisons or contrasts between the performance and athletic data of all four athletes (the Appellant and the three Interested Parties); suffice to state that the Member has carefully assessed and weighed all the submissions and evidence and data supplied by the Parties.

33. In simple terms, the Member cannot find, to the applicable standard, that there was any procedural impropriety by the Respondent pursuant to clause 1.7(b) of the AA Nomination Policy. Indeed, the AA Selection Committee (if the quality of and detail in the affidavit of the Chair of Selectors is a benchmark) appears to have been meticulous.

34. In addition, the Appellant has not shown that pursuant to clause 1.7(c) that the Respondent’s decision-making process was unreasonable to the extent that there were no substantive grounds on which to base it. In this, the Member agrees with the Respondent that this ground of appeal is quite an onerous one for any Appellant to carry, effectively asking the Appellant to show that the decision is question was so irrational that no reasonable decision-maker



could have made it. As in judicial review, this is, however, the margin of appreciation given to an expert, decision-maker.

35. In sum, the decision of the AA Selection Committee here with regard to the nomination of the three Interested Parties and the non-nomination of the Appellant was the product of a considered synthesis by that Committee of the relevant AA Nomination Policy and which resulted in a decision that was both procedurally and substantively a fair and reasonable one.
36. The Member notes, with particular regard to paragraph 24 (g) (vi) and paragraph 24 (i)(iv) of the Affidavit of the Chair of Selectors that the AA Selection Committee, among other things:
- (i) Acknowledged fully that the Appellant had improved significantly in recent months and would improve over time;
 - (ii) Noted that the Appellant's personal best time was 2.82 seconds slower than the time run by the winner of the 2023 WPA championships event;
 - (iii) Noted that, in the context of the absence of 3 of the best athletes at the 2023 WPA Championships, Mr Love's personal and season best was significantly slower than the top 3 to 4 athletes in the event and was not close to achieving a medal position; and
 - (iv) Determined that given how far their respective performances currently were from a medal winning pace in their respective events, that the other Interested Parties had better future potential to win a medal than Mr Love.
37. Finally, the Appellant was well-represented by his parents, neither of whom have legal qualifications, and they were at pains to emphasise throughout this process (as was Jackson Love himself) that their arguments were legal and technical in nature and must be seen in the context of the AA's Nomination criteria and were not to be taken as being personally directed against or discrediting of the Interested Parties. The sincerity of that sentiment is duly noted.

THE TRIBUNAL THEREFORE DETERMINES:

1. The Appeal is dismissed.
2. The Appellant has not discharged the onus upon him to make out the grounds of appeal noted in clause 1.7(b) and (c) of Appendix 2: Appeals Process of the Athletics Australia 2024 Paralympic Games Nomination Appeals Procedure Regulation.
3. Subject to clause 1.14 of Appendix 2: Appeals Process of the Athletics Australia 2024 Paralympic Games Nomination Appeals Procedure Regulation, this Determination is binding on the Parties and no further appeal, including to Court of Arbitration for Sport (CAS), shall be allowed.

Date: 15 July 2024

Jack Anderson

Professor Jack Anderson