

Case number: NST-E24-400771

Case Title: Applicant v National Sporting Body

Determination

National Sports Tribunal General Division

sitting in the following composition:

Member Mr Anthony Lo Surdo SC

in the arbitration between

Applicant

(Applicant)

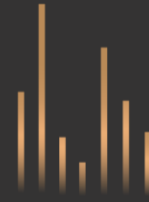
Represented by Legal Representative

And

National Sporting Body

(Respondent)

Represented by National Sporting Body Integrity Staff

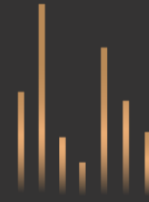


PARTIES

1. The Applicant (the **Applicant**) is a long-term volunteer in the sport, both as an official, board member and club member.
2. The Respondent (the **National Sporting Body**) is the national sporting body for the sport.
3. At the time of the Complaint, the Applicant was a member of the National Sporting Body and bound by the rules, regulations and policies of the National Sporting Body.

INTRODUCTION

4. Below is a summary of the relevant facts and allegations based on the parties' written submissions and evidence. Additional facts and allegations found in the parties' written submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows.
5. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the parties in the present proceedings, the Sole Arbitrator refers in his Award only to the submissions and evidence considered necessary to explain the reasoning.
6. On 8 July 2024, the National Sporting Body received an email from State Police indicating that certain "behaviour" by the Applicant which was witnessed by two persons was not "appropriate", was the subject of a police investigation and recommending that the National Sporting Body take "Provisional Action" against the Applicant, presumably pending the determination of the police investigation.
7. Immediately following the receipt of the email from State Police, the National Sporting Body notified the Applicant in writing that it had received information alleging a breach of policies in the National Integrity Framework, that information concerning these allegations would be provided to the Applicant in due course and that it had determined provisionally to suspend the Applicant's membership and duties as an official under clause 7.4 of the National Sporting Body Complaints, Disputes and Discipline Policy (**CDDP**) whilst the allegations were being assessed.
8. On 30 July 2024, State Police notified the National Sporting Body that on 29 July 2024 police issued the Applicant with a "stalking caution", that when served with the caution, the Applicant "...recalled the incident at the [Sports Centre] however was not of the belief that his behaviour was inappropriate...", was upset, apologetic and removed his Facebook friend request to a complainant in the presence of the police.
9. Consequently, on 30 July 2024, the National Sporting Body wrote to the Applicant noting that he had been served with a stalking caution, indicating that it would not be investigating the matter but that it considered his conduct to constitute a breach of the Safeguarding Children and Young People Policy (**Policy**) and the National Sporting Body Code of Conduct (**Code**). The National Sporting Body also proposed a date and time for an interview to enable the Applicant an opportunity "to comment on these circumstances."



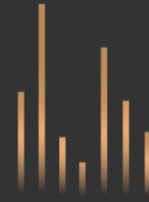
10. On 31 July 2024, the National Sporting Body wrote to the Applicant indicating that it considered the service of the stalking caution to be a breach of section 4.1(b)(i)(i) and (iv) of the Policy and section 5.1(a) and (b)(i) and (ii) of the Code.
11. Following an interview with the Applicant on 5 August 2024 and a written statement provided by the Applicant to the National Sporting Body on 9 August 2024, on 14 August 2024, the National Sporting Body issued the Applicant with a “Breach Notice” pursuant to clause 8.5 of the CDDP and proposed a sanction comprising permanent suspension from membership of a club and from holding any role as an official (**Breach Notice**).
12. By Arbitration Agreement, dated 14 October 2024, the parties agreed to refer to the National Sports Tribunal (**Tribunal**) to determine the issue of the appropriate sanction. In doing so, the Tribunal acts as a hearing tribunal pursuant to clause 8.7(b) of the CDDP (**Arbitration Agreement**).

NST JURISDICTION

13. This is a dispute which has been referred to the Tribunal by the National Sporting Body as an eligible matter under its CDDP.
14. Clause 8.5(b)(ii) of the CDDP provides that a respondent to a Breach Notice has a right to a hearing in relation to the alleged breach and/or proposed sanction. Clause 8.6(b) of the CDDP provides that if the matter is an “NST eligible matter”, the National Sporting Body Complaint Manager must refer the matter to the NST General Division for arbitration.
15. The Tribunal has jurisdiction in this matter pursuant to section 23(b)(i) of the *National Sports Tribunal Act 2019 (Cth)* (**NST Act**). The parties have confirmed the jurisdiction of the Tribunal in the Arbitration Agreement.

PROCEEDINGS BEFORE THE NST

16. On 2 September 2024, the National Sporting Body filed its application with the Tribunal.
17. On 7 October 2024, the Tribunal convened a Preliminary Conference with the Applicant and the National Sporting Body.
18. On 14 October 2024, the Arbitration Agreement was executed and as agreed by the parties:
 - (a) on 28 October 2024, the Applicant filed submissions with the Tribunal;
 - (b) on 11 November 2024, the National Sporting Body filed submissions with the Tribunal; and
 - (c) on 18 November 2024, the Applicant filed submissions in reply with the Tribunal.
19. On 19 November 2024, the Parties each requested that the Tribunal determine the proceedings on the basis of their written submissions and documentary evidence and without a hearing.



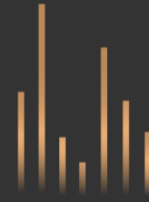
20. On 25 November 2024, the NST informed the Parties that the Sole Arbitrator deemed himself sufficiently well-informed to decide the case based solely on the Parties' written submissions and documentary evidence, without the need to hold a hearing.

APPLICABLE RULES

21. Having regard to the date on which the conduct which founded the Breach Notice occurred and the date of the issue of the Breach Notice, the Policy and the Code, each of which commenced on 1 January 2024, apply.
22. Clause 3.1 of both the Policy and Code applies to a "Relevant Person" which, by definition, extends to a person in the Applicant's capacity, provides that a Relevant Person commits a breach of the Policy if they engage in any of the conduct specified in clause 4 of the Policy and Clause 5 of the Code.
23. Having regard to the date on which the conduct which founded the Breach Notice occurred and the date of the issue of the Breach Notice, the CDDP, which commenced on 1 January 2024, applies. Clause 5.1 of the CDDP relevantly provides that certain conduct that is referred to as "Prohibited Conduct" under the Policy and/or Code comprises a breach of the CDDP.
24. Clause 8.4(a) of the CDDP provides that the National Sporting Body may impose sanctions where behaviour warrants such action. Clause 8.4(b) of the CDDP further provides that when deciding on an appropriate sanction the National Sporting Body may refer to the Sport Integrity Australia Case Categorisation Model and may consider each of the matters enumerated in clause 8.4(b).

THE EVIDENCE

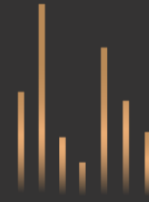
25. The Applicant relies on the following evidence:
- (a) an email dated 8 July 2024, from State Police to the National Sporting Body;
 - (b) an email dated 8 July 2024, from National Sporting Body to the Applicant containing notice of a provisional suspension of the Applicant;
 - (c) an email dated 30 July 2024, from State Police to the National Sporting Body;
 - (d) an email dated 30 July 2024, from the National Sporting Body to the Applicant;
 - (e) an email dated 31 July 2024, from the National Sporting Body to the Applicant;
 - (f) a file note of meeting between the National Sporting Body and the Applicant on 5 August 2024;
 - (g) an email from the Applicant to the National Sporting Body, dated 9 August 2024 attaching an undated written statement;
 - (h) the Breach Notice; and



- (i) an email from the National Sporting Body to the Applicant's legal representatives, dated 28 October 2024.
26. The National Sporting Body relies on the following evidence:
- (a) the Breach Notice;
 - (b) an email dated 8 July 2024, from the National Sporting Body to the Applicant;
 - (c) an email dated 30 July 2024, from State Police to the National Sporting Body; and
 - (d) a written statement of the Applicant, undated but provided to the National Sporting Body on 9 August 2024.

MAIN SUBMISSIONS OF THE PARTIES

27. The Applicant contended, in summary, that:
- procedural fairness dictates that a person be given an opportunity to be heard and present evidence before a decision is made which may affect that person's rights, interests or legitimate expectations (see, eg, *Kioa v West (1985) 159 CLR 550*). It also includes disclosing any material that the decision-maker proposes to take into account in making their determination (see, eg, *Etherton v Public Service Board of New South Wales [1983] 2 NSWLR 297* aff'd *Public Service Board of New South Wales v Etherton (1985) 1 NSWLR 430*)
 - a further component of the content of a fair hearing is that the person whose interests will be affected is to be notified of the charge or allegation. In the absence of sufficient particulars of the charge or allegation, or the grounds upon which it is based, it is not possible to understand the nature of the allegation so as to prepare a response to it. Provision of particulars of the allegations also assists in defining the issues. It is especially important in disciplinary proceedings that particulars of the charge be provided (see, eg, *Etherton v Public Service Board of New South Wales [1983] 2 NSWLR 297* aff'd *Public Service Board of New South Wales v Etherton (1985) 1 NSWLR 430* and *Kioa v West (1985) 159 CLR 550*).
 - the bias rule is also a component of procedural fairness which requires that decision-makers are impartial and free from bias, both actual and perceived (see, eg, *Ebner v Official Trustee in Bankruptcy (2002) 205 CLR 337*);
 - the stalking caution and the substance of the allegations underlying it, at least on materials that the Applicant has been provided by the National Sporting Body, do not disclose the precise facts put against him and thus he was denied the opportunity to properly understand the case put against him and to test those claims. Further, the National Sporting Body had in any event pre-determined and concluded that the allegations had been proved by relying upon the fact of the caution alone and did not bring an independent mind to bear on the decision;
 - merely providing the Applicant in preparation for the interview with particulars of the clauses in the National Sporting Body policies which it is alleged he breached is

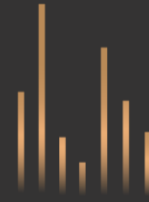


insufficient as, in the absence of details of the underlying facts, the Applicant could not meaningfully respond;

- more troubling is that there are no witness statements, the Applicant made no admissions at the interview and nor were the allegations put to him at any stage; rather, the interview comprised an enquiry for the Applicant to give a free narrative;
- the fact that there was no investigation by the National Sporting Body raises the following matters: in relying on the stalking caution alone, the National Sporting Body predetermined the outcome and therefore the decision is infected with apprehended bias if not actual bias; the National Sporting Body has not engaged with assessing the evidence against the appropriate standard of proof; and to the extent that it relied upon a Sport Integrity Australia brief, which has not been disclosed to the Applicant, it had regard to extraneous material;
- it was incumbent upon the National Sporting Body to: investigate the complaint under clause 7.5 of the CDDP, including obtaining additional evidence; apply the rules of procedural fairness under clause 7.5(b) of the CDDP; assess the evidence against the appropriate standard of proof; and make findings;
- the appeal should be upheld and the charges dismissed as there is “no jurisdiction because there are no proper allegations before [the Applicant], and in turn the NST.” Alternatively, the proposed sanction should be reduced “on account of the significant procedural issues, and the time that [the Applicant] has been provisionally suspended.”

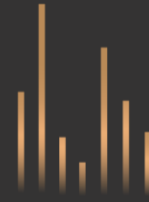
28. The National Sporting Body contended, in summary, that:

- it received a report on 5 July 2024 (Report) concerning the Applicant, made and accepted by it under clause 6.5 of the CDDP which it determined to manage under clauses 6.7(d), 6.7(f) and 6.11 of the CDDP;
- it determined that the alleged behaviour of the Applicant, the subject of the Report, fell within the definition of “Prohibited Conduct” under the Code;
- it categorised the Report under clause 7.2(a) as “Category 3” as it involved allegations of serious and inappropriate behaviour towards a child or young person and was actioned by the police;
- in response to the Report, on 8 July 2024 the National Sporting Body imposed a provisional suspension on the Applicant;
- under clause 8.1(a) of the CDDP, unless a matter has been referred directly to a Hearing Tribunal under clause 7.5, following an investigation, the National Sporting Body may determine to the requisite standard of proof whether the allegations of Prohibited Conduct have been substantiated, unsubstantiated or unable to be substantiated. The National Sporting Body determined the allegations to be substantiated based upon the advice of State Police, dated 30 July 2024 that the Applicant had been issued with a caution for stalking a minor;
- full written particulars of the allegations the subject of the Report were provided to the Applicant on 31 July 2024, he was invited to provide a written response and to attend



an interview with the National Sporting Body to respond to the allegations. The Applicant attended an interview on 5 August 2024 with a support person. At the conclusion of the interview, the Applicant was afforded additional time to provide submissions or character references;

- on 9 August 2024, the Applicant provided a written statement in which he thanked the National Sporting Body for the opportunity to discuss its concerns with him and indicating that he had “...not sought statements of character from the wider community to support [his] case.”
- on 14 August 2024, the National Sporting Body served the Breach Notice on the Applicant;
- there was no denial of procedural fairness. The allegations were clearly put to the Applicant in writing and he was given an opportunity to respond in writing and in the interview. That procedural fairness was observed is acknowledged by the Applicant in his written statement provided following the interview on 9 August 2024;
- there was no bias;
- the proposed sanction is reasonable and proportionate in the circumstances;
- in arriving at the proposed sanction in the Breach Notice, the National Sporting Body had regard to the following:
 - at the time of the investigation, the Applicant was a board member, an official and a club member, held senior positions of authority in the sport and had clear obligations to uphold the values and standards of the National Integrity Framework;
 - the underage athlete involved was also a club member and should have been able to trust the Applicant. Instead, she was left traumatised by the experience and reported his conduct to the police;
 - the protection of children and young people in the sport is paramount;
 - the National Sporting Body accepted the advice of police that the behaviour of the Applicant was inappropriate, that the Applicant did not believe his behaviour was inappropriate, that he was upset and apologetic about the situation and appeared to understand the consequences of continued inappropriate behaviour;
 - the comments made by the Applicant in his interview on 5 August 2024 and in his written statement of 9 August 2024 against the mitigating and aggravating circumstances in the CDDP and reflected in the National Integrity Framework: Case Categorisation & Guidance for Sanctions Booklet (**Booklet**) which circumstances were outlined in the Breach Notice.
- Whilst in correspondence dated 25 August 2024, the Applicant gave notice that he disputed the findings and the proposed sanctions in the Breach Notice, in these proceedings, he has only disputed sanction. The proceedings are only concerned with sanction.



29. The Applicant submitted, in reply, that:

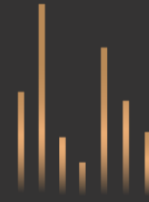
- the provisional suspension under clause 7.4 of the CDDP was not inappropriate;
- under clause 7.5, the National Sporting Body was not obliged to conduct an investigation, which is discretionary, but in this case the failure to investigate was in error and it should not have solely relied upon the stalking caution;
- whilst the Arbitration Agreement records that the “main issue” is the proposed sanction, the sanction is necessarily tethered to the findings; the process of which was tainted by a denial or procedural fairness;
- the National Sporting Body embarked upon a process of simply putting the fact of the stalking caution to the Applicant with the intent of prompting a free narrative in response to which the Applicant referred to having made a Facebook friend request to an athlete which he had subsequently removed as the impugned conduct;
- the giving of the stalking caution to the Applicant did not obviate the requirement to investigate the allegations and to provide the Applicant with sufficient details of those claims to enable him to properly respond. A stalking caution has no effect in law. Accepting it as constituting the “outcome” for the purposes of the Breach Notice was procedurally unfair; and
- the Breach Notice, for the first time, contains allegations of “some non-descript behaviours” and references to physical contact, inappropriate language as well as contact for social media, that the contact was not isolated to the [sporting] environment and was followed up by the sending of a friend request on social media. The origin of these details are not clear and are in the nature of uncorroborated allegations.

MERITS

30. The decision that lies at the centre of these proceedings is that comprised in and evidenced by the Breach Notice.

Preliminary Issue – the nature of the Proceedings

31. An important preliminary issue is whether these proceedings concern the factual findings in the Breach Notice or whether it is limited, as the National Sporting Body contends, to sanction alone.
32. The Applicant accepts that, as the Arbitration Agreement makes plain, he “...appeal[s] the proposed Sanctions imposed on him...” However, the Applicant contends that he was denied procedural fairness in the circumstances which culminated in the issue of the Breach Notice and that the sanctions were also tainted by those circumstances.
33. In response, the National Sporting Body submits that whilst in correspondence dated 25 August 2024, the Applicant gave notice that he disputed the findings and the proposed



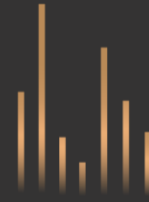
sanctions in the Breach Notice, the proceedings only concern sanction. In any event, the National Sporting Body contends that it has afforded the Applicant procedural fairness.

34. The Tribunal obtains its jurisdiction not only from the provisions outlined earlier in this Award but, relevantly, also from the terms of the Arbitration Agreement.
35. The Tribunal considers that whilst the proceedings are concerned with the sanctions proposed by the Breach Notice, the sanctions are inextricably bound with the facts upon which those sanctions are based including those disclosed in the Breach Notice. Therefore, any examination of the proposed sanctions must, of necessity in this case, require a consideration of the facts and circumstances upon which the National Sporting Body relied in arriving at its proposed sanction including, as the Applicant contends, whether he was afforded procedural fairness.

Was there a denial of procedural fairness by the National Sporting Body?

Principles of Procedural Fairness

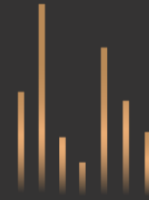
36. The principles of procedural fairness are relatively uncontroversial. They are outlined in the Applicant's submissions, not disputed by the National Sporting Body and may be conveniently summarised, as follows:
 - a decision maker is to "...act fairly...in the making of...decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of the contrary intention...": *Kiora v West* (1985) 159 CLR 550 at 584 per Mason J. It also includes disclosing any material that the decision-maker proposes to consider in making their determination (see, eg, *Etherton v Public Service Board of New South Wales* [1983] 2 NSWLR 297 aff'd *Public Service Board of New South Wales v Etherton* (1985) 1 NSWLR 430);
 - a further component of the content of a fair hearing is that the person whose interests will be affected is to be notified of the charge or allegation. In the absence of sufficient particulars of the charge or allegation, or the grounds upon which it is based, it is not possible to understand the nature of the allegation so as to prepare a response to it. Provision of particulars of the allegations also assists in defining the issues. It is especially important in disciplinary proceedings that particulars of the charge be provided (see, eg, *Etherton v Public Service Board of New South Wales* [1983] 2 NSWLR 297 aff'd *Public Service Board of New South Wales v Etherton* (1985) 1 NSWLR 430 and *Kioa v West* (1985) 159 CLR 550);
 - a failure to accord procedural fairness is a jurisdictional error on the part of the decision-maker: *Minister for Immigration and Multicultural Affairs v Bharadwaj* (2002) 209 CLR 597, 614-5;
 - procedural fairness is concerned with procedure rather than the merits of the exercise of power and the outcome of a decision. As such, the question as to the impact of any breach of those procedures is largely irrelevant. Ordinarily, there is no discretion to refuse relief where there is a breach of procedural fairness, even where the breach does not appear to have affected the outcome: *Kioa* at 584;



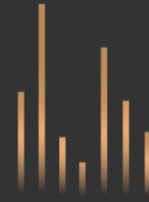
- procedural fairness affords a party an opportunity to raise matters that might not already be obvious or which might create a risk of subconscious prejudice. Therefore, a court cannot consider the merits of a case to evaluate the triviality of a breach. It is the *possibility* rather than the *probability* of what might have occurred that is relevant: *Kioa*, at 620 per Brennan J;
- a breach of procedural fairness in reaching a decision permits a court to issue a writ of *certiorari* or *mandamus*, in other words, a decision may be declared invalid, or orders made to prevent or compel an action;
- relief will not be afforded if the breach could not have affected the outcome, as granting relief in such a case would be futile: *Re Refugee Review Tribunal: Ex Parte Aala* (2000) 204 CLR 82, 153-4 citing *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141; and
- relief will be denied where a decision is achieved on the merits by an independent ground unrelated to the matter in respect of which procedural fairness was denied: *VBAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 965 [33] or where a decision-maker would have been bound to come to the same conclusion on another legal basis whether the breach of procedural fairness had occurred or not.

The facts relevant to the National Sporting Body's decision as to Sanction

37. On 5 July 2024, the National Sporting Body received the Report which the National Sporting Body contends was “made and accepted by” it under clause 6.5 of the CDDP. The National Sporting Body determined to manage the Report under clauses 6.7(d), 6.7(f) and 6.11 of the CDDP, that is, by not appointing an independent investigator but instead appointing a “Complaint Manager” to be responsible for managing the National Sporting Body’s obligations under the CDDP. A copy of that Report was neither provided to the Applicant nor is in evidence before the Tribunal.
38. The National Sporting Body determined that the alleged behaviour of the Applicant, the subject of the Report, fell within the definition of “Prohibited Conduct” under the Code and categorised the Report under clause 7.2(a) as “Category 3” because it involved allegations of serious and inappropriate behaviour towards a child or young person and was actioned by the police.
39. On 8 July 2024, the National Sporting Body received an email from State Police indicating that certain “behaviour” by the Applicant which was witnessed by two persons was not “appropriate”, was the subject of a police investigation and recommending that the National Sporting Body take “Provisional Action” against the Applicant.
40. Immediately following the receipt of the email from State Police, the National Sporting Body notified the Applicant in writing that it had received information alleging a breach of policies in the National Integrity Framework, that information concerning these allegations would be provided to the Applicant in due course and that it had determined provisionally to suspend the Applicant’s membership and duties as an official under clause 7.4 of CDDP whilst the allegations were being assessed.



41. On 30 July 2024, State Police notified the National Sporting Body that on 29 July 2024 police issued the Applicant with a “stalking caution”, that when served with the caution, the Applicant “...recalled the incident at the sports centre however was not of the belief that his behaviour was inappropriate...”, was upset, apologetic and removed his Facebook friend request to the complainant, in the presence of the police.
42. Consequently, on 30 July 2024, the National Sporting Body wrote to the Applicant noting that he had been served with a stalking caution, indicating that it would not be investigating the matter but that it considered his conduct to constitute a breach of the Policy and the Code. The National Sporting Body also proposed a date and time for an interview to enable the Applicant an opportunity “to comment on these circumstances.”
43. On 31 July 2024, the National Sporting Body wrote to the Applicant indicating that it considered the service of the stalking caution to be a breach of section 4.1(b)(i)(i) and (iv) of the Policy and section 5.1(a) and (b)(i) and (ii) of the Code. Whilst that communication stipulated the provisions of the Policy and Code which the National Sporting Body considered the Applicant had breached, it provided no particulars of the facts, matters and circumstances which the National Sporting Body considered comprised breaches of the Policy and Code by the Applicant.
44. On 5 August 2024, the Applicant attended an interview with the two staff members of the National Sporting Body. The Applicant had a support person in attendance. A file note of that meeting was prepared by the National Sporting Body which discloses, in summary, that:
 - the National Sporting Body was “not investigating this matter as we rely on the action taken by the police...we accept their outcome”;
 - the Applicant understood that the National Sporting Body had informed him that it considered the Applicant to have breached the standards as outlined in the Code and the Policy;
 - the Applicant was asked to identify his current roles in the sport and how long he had been performing those roles, to which he provided a detailed response of the various volunteer roles that he had performed over a period of some 18 years;
 - the Applicant was asked to explain the circumstances that led to the police issuing him with a caution for stalking. The Applicant responded that: he attended a Club night at which the complainant initiated a conversation with him in which he asked her about her school and she revealed that she was in high school; the complainant sat with his child; he cannot recall any physical contact with the complainant; he removed the Facebook friend request and will abide by the caution not to have any further contact with the complainant; he made a mistake in sending an unsolicited Facebook request; it was a one-off incident and he felt foolish having done so especially after having undertaken safeguarding training;
 - in response to a question as to what feedback the police had provided him, the Applicant said that when issuing him with a stalking caution they said that the Applicant had made the complainant feel uncomfortable, that the stalking caution was not for a

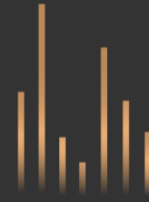


crime, that he had deleted the Facebook request and would not contact the complainant again;

- the Applicant was asked how the sports community or community in general would view his conduct especially as he was a board member and an official, being both positions of trust, to which he responded that: he had no idea of community expectations; he didn't want to be tarred with the brush of mistrust; and had no harmful intentions, he just made a silly mistake;
- the Applicant was asked why did the police state that he was not of the belief that his behaviour was inappropriate especially as he had attended Safeguarding Children and Young Person education via the SIA, to which he responded that: the education shows scenarios regarding higher levels of mistrust; the purpose of the education is to avoid situations where adults obtain the trust of young people for nefarious purposes; other people engage with children/young people on social media; he wants to see when others do well so he can share their successes; it is easy to click on a friend button and he should have asked before he did so;
- when asked whether there was anything that he would like the National Sporting Body to take into consideration with regards to his breach of standards, the Applicant responded that: he had spent a third of his life in the sport and doesn't want it taken away; feels foolish as he has done the training; it was a one-off mistake and it will never happen again; and he felt shattered and disappointed with himself; and
- at the conclusion of the interview, the Applicant was asked to provide any further information and/or letters of support by the close of business that week.

45. On 9 August 2024, the Applicant provided the National Sporting Body with an undated statement, the salient features of which were:

- so as to not create greater attention to this matter, he had not sought statements of character from the wider community to support his case;
- an expression of remorse and regret over the action to make a friend request on social media with an underage athlete which was made for a completely innocent purpose of taking an interest in the career of one of his children's friends but unfortunately, he did not reflect on its wider implications;
- he did not make the connection between the use of social media by adults for the range of nefarious reasons with children and his innocent and naïve friend request. In hindsight, it was extremely foolish and from his child protection training, he should have considered the harm that it could have caused;
- he was apologetic for his actions and hoped that it had not caused the complainant any harm;
- State Police reiterated to him that his actions were not criminal and would not impact on the Applicant's Working with Children Clearance; and

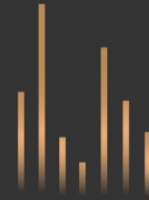


- requested that the National Sporting Body consider his near 20 years of volunteer service to the sport as a parent, club member, official, committee member and board member.

46. On 14 August 2024, the National Sporting Body issued the Applicant with a “Breach Notice” pursuant to clause 8.5 of the CDDP and proposed a sanction comprising permanent suspension from membership of a club and from holding any role as an official (**Breach Notice**).

Discussion

47. The Breach Notice outlines the background to it commencing with the imposition of a provisional suspension on 8 July 2024, the issue by the State Police to the Applicant of a caution for stalking on 29 July 2024, the notification by the National Sporting Body to the Applicant on 30 July 2024 that they would not be re-investigating the matter, the National Sporting Body’s written communication to the Applicant of 31 July 2024, the interview of 5 August 2024 and the written statement provided by the Applicant on 9 August 2024.
48. Under the heading, “Proposed Sanction”, the National Sporting Body details the range of factors that it took into consideration under clause 8.4(a) of the CDDP in determining that the appropriate sanction is a “permanent suspension from membership of a club and from holding any role as an official.”
49. Relevantly, the Breach Notice details the following facts which were at no time prior to receipt of the Breach Notice raised by the National Sporting Body with the Applicant and which, in the opinion of the Tribunal, clearly informed the decision of the National Sporting Body:
- that the Applicant’s conduct “was witnessed by other people”, the identities of whom are not disclosed nor are any details provided of the conduct that those persons allegedly observed;
 - the behaviour also included “unnecessary physical contact and inappropriate language as well as contact via social media”; the nature of the physical contact and details of the alleged inappropriate language together with where and when that conduct allegedly occurred and by whom it was witnessed are not disclosed;
 - the conduct “was not isolated to the [sporting] environment”; if the suggestion here is that the conduct occurred in multiple locations, both the nature of the conduct and the locations at which it was alleged to have occurred are not disclosed;
 - the complainant made a complaint to State Police because she was, “concerned for her safety. The potential impact on her was serious and has the ability to impact her psychological well-being.”
50. For completeness, the Tribunal notes that in its submissions, the National Sporting Body refers to a Report that it received on 5 July 2024 concerning the Applicant. The National Sporting Body does not identify who made the report much less its contents and the extent to which, if at all, its contents informed the National Sporting Body’s decision. The Report pre-dated the issue of the caution for stalking. If the Report or any of its contents

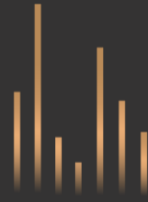


were taken into consideration by the National Sporting Body in its decision to issue the Breach Notice or informed the contents of that notice, procedural fairness required that either it or its contents should have been disclosed to the Applicant prior to the issue of the Breach Notice.

51. The National Sporting Body contends that its letter of 31 July 2024 to the Applicant contains “[f]ull written particulars of the allegations the subject of the Report.” The Report is not, however, in evidence and thus that assertion is not able to be considered by reference to the source document itself. The letter of 31 July 2024 taken at its highest is nothing more than an assertion that the imposition of the caution was considered a breach of certain specified provisions of the Code and Policy. It provides no particulars of the facts that ground that assertion apart from a reference to the caution itself. Further, and curiously, as the caution post-dates the Report, it is not obvious how the Report can contain any information referable to the caution itself.
52. Acting in accordance with the dictates of procedural fairness, the National Sporting Body should have raised these important facts and circumstances directly with the Applicant prior to issuing the Breach Notice and provided him with an opportunity to respond. As the authorities make plain, a component of the content of a fair hearing is that the person whose interests will be affected is to be notified of the charge or allegation. In the absence of sufficient particulars of the charge or allegation, or the grounds upon which it is based, it is not possible to understand the nature of the allegation so as to prepare a response to it. It is especially important in disciplinary proceedings that particulars of the charge be provided.
53. Further, it would have been patently obvious to the National Sporting Body after it conducted the interview with the Applicant on 5 August 2024 and from the statement that he provided on 9 August 2024 that he understood the nature of the allegations to be limited to a Facebook friend request that he had made to an underage member of his Club at a Club event which he attended with his child. It was particularly incumbent upon the National Sporting Body to have made a disclosure to the Applicant of circumstances known to it at that time which were to influence its ultimate decision to propose any sanction let alone one that was as serious as that proposed in the Breach Notice.
54. The National Sporting Body’s failure to do so comprised a denial of procedural fairness with the consequence that the decision-making process fundamentally miscarried. That failure is a jurisdictional error depriving the decision manifested in the Breach Notice of any validity. Ordinarily there is no discretion to refuse relief where there is a breach of procedural fairness.

THE TRIBUNAL THEREFORE DETERMINES:

55. For the reasons set out in this determination, the Tribunal finds that the National Sporting Body did not afford the Applicant procedural fairness in arriving at its decision as evidenced by the Breach Notice, that it therefore had no jurisdiction to make that decision, it is not valid and should be set aside.



56. Given this determination, the issue as to the proportionality of the proposed sanction does not arise.

Date: 27 November 2024



Signature

Mr Anthony Lo Surdo SC