

Case number: NST-E23-47455

Case Title: Emma Hogan v Triathlon Australia

Determination

National Sports Tribunal General Division

sitting in the following composition:

Panel Member

Mr Christopher Johnstone

in the arbitration between

Emma Hogan

(Applicant)

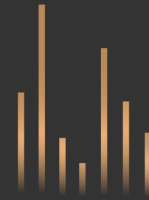
Represented by Emma Carney, Authorised Representative

And

Triathlon Australia

(Respondent)

Represented by Tim Harradine, CEO



PARTIES

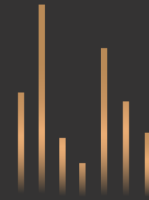
1. The applicant (appellant) in this arbitration is Ms Emma Hogan and is represented by her coach, Ms Emma Carney. Ms Hogan is a triathlete and member of Triathlon Australia (**TA**).
2. TA is the official National Sporting Organisation responsible for the management and delivery of the sports of triathlon, paratriathlon and multisport within Australia. In this arbitration it is represented by its Chief Executive Officer Mr Tim Harradine.
3. In addition, the Tribunal invited participation from Ms Emma Jeffcoat and Ms Sophie Linn being persons potentially interested in the outcome of the appeal, however they both declined to participate.

INTRODUCTION

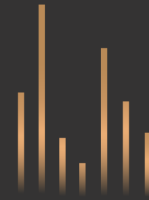
4. Ms Hogan appeals against her non-selection by TA in a World Triathlon Cup event to take place on 25 and 26 March 2023 in New Plymouth (**NP Event**) (**the appeal**).
5. This appeal was fast-tracked and heard by video conference as a matter of urgency on the evening of Thursday 23 February 2023.
6. Whilst it was of no-consequence to the appeal, the Tribunal observes that the appeal was adjourned once to enable Ms Hogan further time to prepare. On Thursday 23 February 2023, Ms Hogan requested a further adjournment to respond to the submission of TA which the Tribunal refused on the basis that such an adjournment would adversely affect Ms Hogan given that TA had until 24 February to finalise its selections for the NP Event.
7. On the morning of Friday 24 February 2024, the parties were notified that the appeal was dismissed.
8. These are the Tribunal's reasons for dismissing the appeal.

NST JURISDICTION

9. 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 23 of the NST Act was appointed by the CEO of the Tribunal under instrument to conduct this arbitration in the General Division of the Tribunal.
10. 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.
11. Section 40 of the NST Act sets out general principles applicable to arbitration as follows:
 - (1) In the arbitration:
 - (a) the procedure of the Tribunal is, subject to this Act, within the discretion of the Tribunal; and
 - (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.
12. In addition, section 28 of the National Sports Tribunal Practice and Procedure Determination 2021 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 and evidence is not required to be given on oath, although the Tribunal may require the administration of an oath in its discretion.
 13. No party requested any evidence be given on oath, and the Tribunal did not consider sworn testimony to be necessary for the proper disposition of this arbitration. No party objected to this course of conduct.
 14. No party objected to the procedure adopted by the Tribunal during the Arbitration.
 15. There was no-objection to the Tribunal hearing and determining the outcome of the Appeal.
 16. 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 TA) 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 Ms Hogan) may apply to the Tribunal for arbitration of the dispute.
 17. TA has adopted the World Triathlon Cup (**WTC**) Selection Policy (**the Selection Policy**) for the purposes of selecting athletes for the various WTC events in 2023.
 18. Section 10 of the Selection Policy relates to appeals and provides:
An Eligible Athlete, who is not selected, may appeal that decision, under the Triathlon Australia (Fast Track) Appeals Policy, dated 2022.
 19. Clause 4 of the *Triathlon Australia (Fast Track) Appeals Policy* (**the Appeals Policy**) relevantly provides that:
A Non-Selected Athlete may appeal against their non-selection to a Triathlon Australia Team for an Event (Selection Appeal) in accordance with the procedures set out in cl. 5 of this policy.
 20. Clause 5 of the Appeals Policy sets out the Fast Track Appeals process.
 21. Relevantly:
 - I. Clause 5.1(a) mandates compliance with the steps set out in clause 5.1;
 - II. Clause 5.1(b) requires an appeal to be notified by written notice within 8 hours of non-selection;
 - III. Clause 5.2(a) provides that a Selection Appeal must be heard in the General Division of the Tribunal at first instance; and
 - IV. Clause 5.2(b) provides as follows:
A Non-Selected Athlete may bring a Selection Appeal to the General Division of the NST for hearing on one or more of the following grounds, which the Non-Selected Athlete (Appellant) bears the onus of making out:



(i) that the Selection Policy was not properly applied by Triathlon Australia with respect to the Non-Selected Athlete;

(ii) the Non-Selected Athlete was not afforded a reasonable opportunity by Triathlon Australia to satisfy the Selection Policy;

(iii) Triathlon Australia was affected by actual bias in making its decision to not select the Non-Selected Athlete; and

(iv) there was no material on which Triathlon Australia's decision could be reasonably based.

22. As to the outcome of the appeal itself, the clause 5.2(g) to (j) provides:

(g) The NST may uphold or dismiss a First Instance Selection Appeal.

(h) Subject to cl. 5.2(k), where the NST upholds a First-Instance Selection Appeal overturning the original selection decision, the NST must refer any subsequent decision regarding the Appellant's non-selection or if required, any broader decision regarding selection of the Team for the Event back to the Triathlon Australia for reconsideration and redetermination.

(i) In reconsidering and determining the Appellant's non-selection or if required, any broader decision regarding selection of the Team for the Event, Triathlon Australia must observe the principles of natural justice. Any decision made by Triathlon Australia regarding the Appellant's nomination after such referral, is final and binding on the Appellant.

(j) Notwithstanding cl. 5.2(i) the NST may itself determine the issue of the Appellant's selection, or broader decision regarding selection of the Team for the Event where the NST determines that:

(i) it would be impractical to refer the selection decision for redetermination to Triathlon Australia given the time available; or

(ii) in making its original decision, Triathlon Australia had such disregard for proper application of the Selection Policy that a reasonable person would apprehend that it is unlikely that the Selection Policy would be applied properly by Triathlon Australia if the decision regarding the Appellant's non-selection was referred back to Triathlon Australia.

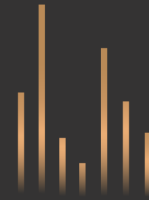
23. In her application, Ms Hogan relies on actual bias (clause 5.2(b)(ii)) as the basis for her appeal against non-selection (although in the course of the hearing Ms Carney also submitted that she wished to rely on the mis-application of the Selection Policy as a separate ground of appeal). Accordingly, the remedy Ms Hogan sought was that the Tribunal itself determine the question of Ms Hogan's selection pursuant to the power in clause 5.2(j)(ii) on the basis that a finding that Ms Hogan's selection was affected by actual bias would necessarily require finding in that subclause to justify such a decision.

FACTUAL BACKGROUND

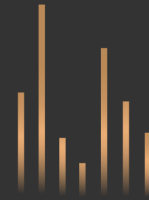
24. Each party filed and relied on written submissions including written submissions in reply from Ms Hogan.

25. Ms Carney augmented Ms Hogan's submissions with oral submissions.

26. Clause 4.1 of the Selection Policy itself provides for Automatic and Discretionary nominations. To be eligible for either nomination, an athlete must meet the eligibility criteria in clause 2.1. It was not in dispute that Ms Hogan met the eligibility criteria.



27. The nomination process is prescribed in clause 3. It was also not in issue that Ms Hogan had complied with this process.
28. Clause 4.5 of the Selection Policy records that for the 2023 WTC events, TA may nominate (but is not required to nominate) up to 5 athletes for full WTC events.
29. In respect of the NP Event, TA nominated 5 athletes, 3 of whom (Jas Hegeland, Charlotte McShane and Kira Hegeland) were automatic nominations according to the Selection Policy, and two of whom, being Emma Jeffcoat and Sophie Lim were discretionary nominations.
30. During the course of oral address, Ms Carney said words to the affect that she accepted that Ms Linn had had “*a good summer*” and on the basis of her results, her selection was not disputed.
31. Thus, as to the secondary aspect of Ms Hogan’s appeal based on mis-application of the selection criteria, Ms Jeffcoat’s selection was the target of Ms Hogan’s appeal.
32. Clause 4.3 sets out the manner in which TA may exercise its discretion in selecting athletes where the quota for an event has not been filled through Automatic nominations.
33. It provides:
- 4.3 Any remaining positions/s not nominated automatically (including athletes who are ranked in the top 3 Australians but not ranked in the top 80 on the WT Rankings), may be nominated via discretion.
- 4.3.1 In exercising its discretion in nominating athletes for selection in WTC races, the NPD, in consultation with the TAESC, may (in its absolute discretion) consider any relevant matter, ensuring that nominations align with clause 1.2. In determining athlete readiness to be competitive in a WTC race the NPD/TAESC may consider the following;
- (a) athlete performances at 2022 and 2023 WTCS, World Cups and Continental Cups (including assessment of the quality of field in any relevant event) in line with clause 5.
- (b) if the athlete has a low or no World Triathlon ranking with a significantly improving performance profile;
- (c) If the athlete is returning from an enforced period out of competition but has a past history of elite performances in WTCS or WTC;
- (d) Injury/Illness history and Status.
- 4.3.2 This discretion is absolute and need not be exercised.
34. Clause 1.2 describes the primary object of the Selection Policy as follows:
- ...to nominate Athletes whom TA considers have the ability to medal and/or demonstrate the potential to progress to world cup medal performances.
35. Clause 5 is also relevant. It provides:
- 5.1 The following performance standards, based on the previous 12 months, may be used as a guide for Athletes looking at nominating for WTC races;
- (a) have raced at a WTCS level; or
- (b) one (1) CC win; or



(c) two (2) podium places in a (one must be a non Oceania race) CC race; or

(d) two top five (5) places in International (non-Oceania) CC races.

5.2 Although these performance standards may be looked at in assessing an athlete's discretionary nomination (and readiness to race), achieving the listed standards does not guarantee an Athlete nomination for a WTC, neither does it preclude an Athlete from being eligible for consideration for nomination for a WTC.

36. Whilst the discretion reserved to TA is expressed to be absolute, it is informed to a considerable extent by the objective of the Selection Policy expressed in clause 1.2, the factors to which regard may be had as articulated in clause 4.3.1, and the results from events undertaken in the previous 12 months set out in clause 5.1.
37. Whilst most selection policies are expressed to reserve to the selection body, a discretion in absolute terms, it is also usually the case, such as with TA in this case, that the relevant policy prescribes a principal objective to be achieved by the selection process and factors to which regard may be had in considering the exercise of discretion. Discretions must always be exercised reasonably and not capriciously. Prescribed criteria are important to regulate the proper exercise of a discretion. The less the discretion exercised has regard to the prescribed criteria, the more difficult it will be to justify such a selection and the more open to challenge it will be.
38. With this in mind, the focus of Ms Hogan's submissions in this respect was clause 4.3.1(b). It was her submission that not enough regard was placed on her age (she is 22 years of age) and status as a developing athlete compared with Ms Jeffcoat who is 29 years of age.
39. However, as noted above, Ms Hogan's principal ground of appeal relies on actual bias. Her submissions in this respect are considered immediately below.

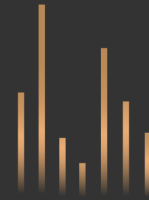
MAIN SUBMISSIONS OF THE PARTIES

40. The particulars of Ms Hogan's allegations of actual bias described in Ms Hogan's written submissions are as follows:
 - I. Emma Hogan not afforded open Communication with TA HP Program
 - II. Emma Hogan not afforded athlete support, care and wellbeing in an NSO HP Program funded by ASC:

Due to TA refusing to communicate with her coach – TA ignoring her and not supporting her as she progresses.
 - III. Emma Hogan Results Ignored:

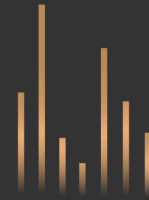
Emma has beaten almost all of the TA categorised athletes. TA only selects from the categorised list. This is bias against Emma H because TA refuse also to categorise Emma H.
 - IV. Categorisation:

Emma Hogan has been selected in an U23 World Championship Team (2021). This in itself provides automatic Athlete Classification for an AUS athlete. Emma Hogan not categorised by



TA. There is long term bias against Emma H by TA. Emma is not selected due to TA bias for categorised athletes and TA refuse to categorise Emma, so she cannot be selected.

41. In considering these submissions, it is easiest to begin with the issue of categorisation.
42. As eventually emerged in oral submissions, TA has adopted a system of categorisation developed by the Australian Institute of Sport (**AIS**) called the National Athlete Categorisation Framework. At its simplest, the category an athlete has determines the funding the relevant athlete ultimately receives (through the Australian Sports Commission). In ascending order, the categories are “Emerging”, “Developing”, “Podium Potential”, “Podium Ready” and “Podium”.
43. Ms Hogan is not categorised and Ms Carney submitted that she should be categorised as Emerging. The absence of funding that comes with not being categorised, Ms Carney submitted, means that Ms Hogan does not have the means to compete at events which, subject to results, would have a positive effect on Ms Hogan’s world ranking, which in turn would affect her eligibility for achieving categorisation. This, Ms Carney described as having a “spiralling effect” on Ms Hogan’s ability to race, and therefore ability to qualify for WTC events.
44. Ms Carney pointed out that under the previous categorisation policy, Ms Carney would automatically have achieved the category of “Emerging” on the basis of past selection in the under 23 World Championship Team but that is not the case under the present policy published by TA on its website. The first step for Ms Hogan to undertake to obtain a category is to apply, however TA confirmed that no application had been made. Ms Carney argued that Ms Hogan was not aware of any requirement to apply due to TA’s ongoing refusal to communicate with Ms Carney and/or Ms Hogan.
45. The issue regarding communication is considered below. But as to whether or not Ms Hogan should have any particular categorisation, that is simply not something about which the Tribunal can make a decision.
46. Nevertheless (and for what it is worth), in oral submissions Mr Harradine described Ms Hogan as “an excellent athlete” who “probably does fall within the [Emerging] category” but stressed the need for Ms Hogan to apply to TA for categorisation (which she has not done in 2022 or 2023). Against this, Ms Carney pointed out that the old categorisation policy (expressed to expire in 2021) remained on the website of TA into 2022, but that is neither here nor there. The policy has changed, and Ms Hogan has an opportunity to apply for categorisation.
47. Ms Carney conceded that the Tribunal cannot make a finding about whether Ms Hogan should be categorised, but rather relied on the fact of the lack of categorisation as an example of TA’s bias against Ms Hogan which, together with TA’s refusal to communicate with Ms Hogan which Ms Carney submitted was linked to Ms Carney being Ms Hogan’s coach means that TA approached the question of Ms Hogan’s nomination for the NP Event by prejudging the selection process against Ms Hogan and that it did not approach the question of Ms Hogan’s selection with an open-mind.
48. There is no doubt that as matters stand between Ms Carney and TA, TA does, and continues to refuse to communicate directly with Ms Carney. Indeed, Mr Harradine stated that following a mediation between Ms Carney and TA which failed to achieve an outcome, TA had implemented business rules preventing members of TA corresponding with, or responding to correspondence from, Ms Carney.



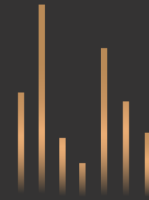
49. This, Mr Harradine said, did not impact on TA's correspondence directly with Ms Hogan and Mr Harradine submitted that Ms Hogan would and does continue to receive correspondence from TA, and in particular the high performance managers responsible for her.
50. This unfortunate state of affairs, Ms Carney seemed to readily concede, resulted from her "calling out" TA, particularly after the results of its athletes at the Tokyo Olympic Games. Ms Carney also said that following certain criticisms she levelled at TA, Sport Integrity Australia required certain changes be implemented at TA.
51. This may be so, but it is also something which is peripheral to the dispute with which the Tribunal is concerned. TA's relationship with Ms Carney is really only relevant if it has, objectively, caused TA to approach the question of Ms Hogan's selection in a manner that is actively biased against her.
52. Ms Carney submits that it has. TA disagrees.

MERITS

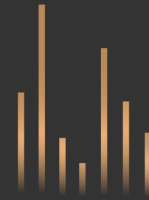
53. In its written submissions, TA did not address in any detail how it exercised its discretion in determining which athletes it would select along with the athletes who automatically qualified for the NP Event.
54. This was not a particularly helpful approach. Indeed it was really through the careful analysis of results annexed to Ms Carney's submissions that the Tribunal could glean how and why Ms Jeffcoat and Ms Linn were selected in place of any others. This analysis is discussed further below.
55. Rather, TA's submissions focussed on what Ms Hogan needed to prove to establish actual bias against Ms Hogan.
56. As to actual bias, it said:
 17. First, where bias is alleged, it appears settled that actual bias must be shown as opposed to a reasonable apprehension of bias (*Maloney v National Coursing Association* (1978) 1 NSWLR 161 at 171; *Re Maggacis* (1994) 1 Qld R 59 at 65 - 66; *Bornecrantz v Queensland Bridge Association* at paras 33 - 34; *Jackson v West Australian Basketball Federation* (1990) ALT) 283 at 286; see also the CAS decision in the Emma Carney Appeal; see also *Modahl v British Athletic Federation Limited* (2002) 1 WLR 1192 at 1214).
 18. Proving actual bias is very difficult. As observed by Nicholson J in *Jackson v West Australian Basketball Federation* (at 286) **there is not even:**

"A rule of law that a committee that has adjudicated guilt on issues cannot afford natural justice on a second hearing of the same issues."

Likewise, with selectors.
 19. Moreover, "*actual bias (only) exists where the decision-maker has pre-judged the case against the (athlete), or acted with such partisanship or hostility as to show that the decision-maker had a mind made up against the (athlete) and was not open to persuasion in favour of the (athlete)*" (per North J in *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71 at 134).



20. Indeed, where a selection panel is involved, even to demonstrate that an individual selector was or may have been actually biased may not suffice if it can be shown that the panel's decision, looked at on an overall basis, was a fair one (*Modahl v British Athletic Federation*, supra, at 1213 - 1214 (paras 66 - 68), 1232 (para 134); cf *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 578).
21. Equally, it will be by no means easy to establish that selectors have made their decision in bad faith or unreasonably. The Courts have repeatedly warned against the impropriety of a Court or other tribunal coming to a conclusion on the merits of the case under the guise of making a finding that the original decision-maker acted in bad faith, unreasonably or unfairly (the *Carlton Football Club* case at 558 - 559; *McInnes v Onslow-Fane* at 1535; *Foley v Padley* (1984) 154 CLR 349 at 370; *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 at 40 - 42; see also *Zhang v Canterbury City Council* (2001) 51 NSWLR 589 at 601 (para 62); *Cubillo v The Commonwealth* (2001) 112 FCR 455 at 521 (para 254).
57. There is nothing particularly novel about this summary of the law as it applies to actual bias. Indeed, Ms Carney accepted it as correct and submitted that the bias of TA exercised against Ms Hogan was precisely as described in paragraph 19 of TA's submissions.
58. However the Tribunal is unable to agree with Ms Carney in this respect.
59. Ms Carney's submissions as to Ms Hogan's lack of categorisation has already been discussed. The other aspect of Ms Carney's submissions focuses on Ms Hogan's race results and those of the other female triathletes who are categorised either as Emerging, Developing, or Podium Potential.
60. Relevantly, save for two races, Ms Hogan did not compete in 2022. Rather, she focussed on developing her technical skills and endurance.
61. As to the two races in which Ms Hogan did compete, on 30 October 2022 Ms Hogan beat Ms Matilda Offord by four minutes in a classic distance race, and on 11 December 2022, Ms Hogan beat Ms Jeffcoat by 45 seconds in a sprint race in Australia.
62. Ms Hogan's success against Ms Offord is irrelevant for the purposes of this appeal. The Tribunal accepts that her success over Ms Jeffcoat may have had some relevance, however importantly, Ms Jeffcoat also competed in three World Cup Events in 2022 recording two "Did not finish" results and a 25th place in Bergen on 28 August 2022.
63. It is to be recalled that the primary objective under the Selection Policy is "*to nominate Athletes whom TA considers have the ability to medal and/or demonstrate the potential to progress to world cup medal performances.*" Further, one of the factors to which regard may be had in exercising its discretion is whether an athlete has raced at WTCS level in the previous 12 months. Ms Jeffcoat has, Ms Hogan has not.
64. About this, TA submitted that it had taken Ms Hogan's two race results in 2022 into consideration and also to the fact that Ms Linn and Ms Jeffcoat met the requirements of clause 5.1.
65. The Tribunal can see no bias, actual or otherwise in this approach. In other words, there is nothing in the selection of Ms Linn or, more relevantly Ms Jeffcoat that suggests their selections were as a result of bias against Ms Hogan.



66. There is also no obvious mis-application of the Selection Policy in this approach.
67. Ms Carney may well be correct that given Ms Hogan's youth, TA would be well advised to take a longer term approach to her development and expose her (though selection) to competition at a higher level, but that is not the approach it has chosen to take with respect to the NP Event, and, it is not an identified objective in clause 1.2 of the Selection Policy. Its Selection Policy is focussed on more immediate results. It is entitled to adopt such an approach and make selections accordingly.
68. In reality this appeal really comes down to the fact that Ms Carney has a number of complaints about TA which may or may not be legitimate, and which she believes have affected Ms Hogan's chances of selection for the NP Event, but about which there is no objective evidence which supports that belief.
69. The Tribunal finds that there is insufficient evidence to support the claim that TA was actually biased towards Ms Hogan in the sense that it prejudged the selection process for the NP Event against Ms Hogan without giving proper and fair consideration to the merits of her selection. There is no evidence that in the selection process TA acted with such partisanship or hostility so as to have made up its mind against Ms Hogan prior to consideration of her potential selection in accordance with the discretionary factors set out in clause 4.3 of the Selection Policy. The Tribunal also finds that there is no evidence that the exercise of discretion by TA in selecting Ms Jeffcoat (or for that matter Ms Linn) for the NP Event pursuant to clause 4.3 of the Selection Policy miscarried. Accordingly, the Tribunal has no power under clause 5.2(J) of the Appeals Policy to substitute a different selection decision to the decision made by Triathlon Australia.

THE TRIBUNAL THEREFORE DETERMINES:

1. The appeal is dismissed.

Date: 27 February 2023 (determined 24 February 2023)



Christopher Johnstone