

Case number: NST-E23-142346

Case Title: Aspire Senior Rhythmic Gymnastics Group v Gymnastics Australia

**Determination**

**National Sports Tribunal**

**General Division**

**sitting in the following composition:**

Panel Member

Mr Christopher Johnstone

**in the arbitration between**

**Saskia Broedelet, Lidiia Iakovleva, Phoebe Learmont, Jasmine Reichhart,  
Veronika Ushakova and Jessica Weintraub (Aspire Group)**

*(Applicants)*

Represented by Mr Matthew Krog, legal representative

And

**Gymnastics Australia (GA)**

*(Respondent)*

Represented by Mr Chris O'Brien, National Performance Director and Ms Alexandra Ash, CEO

And

**Ainsley Barker, Angelina Boland, Laura Gosling, Ashleigh Law, Tahlya Smith  
and Charlotte Wong (Premier Group)**

*(Interested Parties)*

Unrepresented



## INTRODUCTION

1. This is an appeal by each of the individual members of Aspire Rhythmic Gymnastics Group (**Aspire**) against their non-selection (as a team) to represent Australia at the upcoming World Championships in Valencia, Spain to be held on 23-27 August 2023.
2. Aspire was represented in the appeal by Mr Matthew Krog of Hope Earle Lawyers.
3. The respondent (**GA**) was represented by its National Performance Director, Mr Chris O'Brien and Ms Alexandra Ash, its Chief Executive Officer.
4. The individual members of Premier Group were each interested parties because, necessarily, the outcome of the appeal would affect them as the team that was selected by GA to compete at the World Championships. They are "other persons" under section 23(2)(c)(i) permitted by a constituent document of GA (here the Selection Appeals Policy) to participate in the hearing.

## NST JURISDICTION

5. 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* 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.
6. 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.
7. 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.
8. 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.
9. 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.



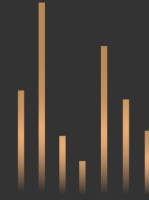
10. No party objected to the procedure adopted by the Tribunal during the Arbitration.
11. There was no-objection to the Tribunal hearing and determining the outcome of the Appeal.
12. The jurisdiction of the National Sports Tribunal to hear and determine the present dispute arises pursuant to section 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 GA) 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 members of Aspire) may apply to the Tribunal for arbitration of the dispute.
13. GA has implemented and adheres to a Selection Appeals Policy approved on 29 September 2020 and reviewed in September 2021 (**the Appeals Policy**) for the purposes of selecting athletes for various events in 2023 including the World Championships.
14. Clause 2.1 of the Appeals Policy provides:

*This Policy sets out the Selection Appeal process to be applied in respect of the selection of GA Teams that are formally selected under a GA Selection Policy.*
15. The applicable Selection Policy is in two Parts (A and B). Part A was approved on 27 March 2022 and reviewed on December 2022 and Part B was approved on 11 November 2022.
16. Part A sets out the over-arching policies of GA towards selections for GA teams irrespective of the particular discipline; Part B applies specifically to rhythmic gymnastics.
17. It was not in issue that the Premier Group gymnasts met the eligibility criteria in clause 6 of Part A and the Selection Criteria in clause 4 of Part B (as did Aspire).
18. For the purposes of this appeal, the clauses 5 and 11 of Part A are relevant. They are in these terms:

*5.1. The Selection Panel will identify Athletes (for Events & Squads) and Coaches (for Events only) for selection to the Team or Squad.*

*5.2. Neither this Policy, the Selection Policy Part B, nor GA or FIG (for Events) require GA to select the maximum possible number of Athletes to a Team or Squad.*

*5.3. Final Team or Squad selections and composition of the Team or Squad are determined at the absolute discretion of the Selection Panel as set out in this Policy and the relevant Selection Policy Part B. For the avoidance of doubt, nothing in this Policy or the Selection Policy Part B operate so as to require the Selection Panel to select any Athletes or Coaches to the Team or Squad or fill all available positions on the Team or Squad.*
19. Clause 11 provides that Selection Appeals are to be conducted in accordance with the GA Selections Appeal Policy.
20. As to Part B:
  - (a) clause 2 says that the objective of the policy is to describe the specific eligibility and selection criteria for the selection of Athletes to the Australian Gymnastics Team to



contest the events described in clause 3.1 (which includes the World Championships);

- (b) clause 7 nominates the three members of the Selection Panel;
- (c) clause 8.1 requires the Selection Panel to consider performances in the Nominated Selection Events, as outlined in Appendix One;
- (d) clause 8.2 provides gymnasts with the opportunity to submit Video Selection Activities (**VSA**) (described in clause 10.2 as an opportunity for Athletes to submit at particular times, routines to be assessed by a judging panel to contribute to results data for Event(s) selection); and
- (e) clause 9.2 is in these terms:

*9.2. When determining Athletes to be nominated, the Selection Panel may consider the following: 9.2.1. An Athlete's ability to contribute towards performance targets outlined in Appendix Two.*

*9.2.2. Performance at Events listed in Appendix One. These Events will be weighted at the discretion of the Selection Panel. In the weighting of Events, the Selection Panel will consider several factors including but not limited to, recency of Events and level of competition.*

*9.2.3. Individual Learning and Performance Plans of Athletes under consideration.*

*9.2.4. In exceptional circumstances, the Selection Panel reserves the right to consider performance in Events outside of those listed in Appendix One.*

*[Emphasis added]*

- 21. Whilst Appendix One is a little confusing in the sense that it includes as “Nominated Selection Events”, future events such as the World Championships, this apparent confusion is explained by the fact that this document is intended to apply for the whole of 2023 and 2024 such that, as the Tribunal understood the submissions of GA, depending on the time the relevant selection decision is made, GA would consider past performances up to twelve months earlier.
- 22. As will become clear, each of Premier Group and Aspire competed in a number of events set out in Appendix One to Part B. It is how GA considered the performances of the teams in those events that is at the heart of this appeal.
- 23. However, before considering those facts, it is important to identify the context in which this appeal may be considered.
- 24. Clauses 5.1 and 5.2(c) - (g) of the Appeals Policy describe the formal requirements an applicant must meet in bringing an appeal of this nature. It was not disputed that those requirements had been met.
- 25. Clause 5.2(a) prescribes that a Selection Appeal must be heard in the General Division of the NST at first instance.



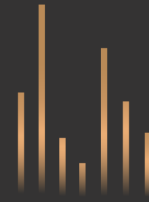
26. As to the grounds on which an appeal may be brought, clause 5.2(b) of the Appeals Policy states that an appellant bears the onus of establishing (relevantly):
- (i) that Selection Policy Part A and/or Part B was not properly applied by GA with respect to the Non-Selected Athlete;*
  - (ii) ... ;*
  - (iii) GA was affected by actual bias in making its decision to not select the Non-Selected Athlete; and*
  - (iv) there was no material on which GA's decision could be reasonably based.*
27. Pursuant to clause 5.2(i) of the Appeals Policy, where the NST upholds a First-Instance Appeal (which this is), the NST must refer any subsequent decision back to GA for reconsideration.
28. However clause 5.2(i) is subject to clause 5.2(k) which provides that 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 (either) that in the time available, it would be impractical to refer the decision back to GA or that in making its original decision, GA had such disregard for proper application of the Selection Policy Part A and/or Part B that a reasonable person would apprehend that it is unlikely that the Selection Policy Part A and/or Part B would be applied properly by GA if the decision regarding the Appellant's non-selection was referred back to GA.
29. All parties agreed that clause 5.2(k) should apply to this appeal such that if the Tribunal were to uphold the appeal, it was to make the decision as to which team should be selected for the World Championships.

## THE APPEAL

30. Turning to the application itself, Aspire brings this appeal in reliance on clauses 5.2(b)(i), 5.2(b)(iii) and 5.2(b)(iv) of the Appeals Policy.
31. Shortly after the Appeal was filed, Aspire notified the Tribunal that certain allegations on which it wished to rely in respect of the allegation of bias relating to an integrity matter were confidential to one member, and not known to Premier. They were however known to GA because they related to a matter reported to it.
32. Following a confidential directions hearing held on 2 June 2023, the Tribunal directed that any submissions and evidence relating to the Integrity-related matter raised by a member of the Aspire Group on or about May 2022 to Gymnastics Australia are to be received by the Tribunal on a confidential basis and disclosed only to Gymnastics Australia.
33. That direction sufficiently identified the relevant matter for both GA and Aspire.
34. The direction was notified to all parties including Premier.
35. Also as notified to all parties at the time, the reasoning of the Tribunal in making the direction was that because integrity matters are, of themselves confidential, the Interested Parties could



- not rationally offer any submissions or evidence one way or the other that would be probative or relevant as they are not aware of the particular matter at all. Therefore no unfairness would occur if the Tribunal were to proceed to hear the matter in this manner.
36. At the hearing of the appeal, no party raised any concern as to the manner in which the Tribunal had proceeded. In addition, in a confidential hearing held to the exclusion of the Interested Parties, further oral submissions were received from Aspire directed solely to the ground of actual bias.
  37. At the end of that hearing the Tribunal indicated that it was not satisfied that there was sufficient evidence to discharge the very high onus of proving actual bias, and that as a consequence, that ground of the appeal would not be upheld. Further confidential reasons are provided with these reasons (which will not be published) and which will only be provided to GA and Aspire.
  38. As to the remaining grounds of appeal, there was no real distinction drawn in the submissions between these two grounds although the main thrust of the submissions seemed directed more to establishing the mis-application of the Selection Policy under clause 5.2(b)(i) than clause 5.2(b)(iv).
  39. This is not surprising. As will be explained, Aspire's appeal really relied on a comparison of the results each team achieved at the various events which the GA selectors considered in making their selection decision.
  40. The problem with such an approach is that an applicant who brings an appeal based on clause 5.2(b)(iv), to succeed, must prove to the Tribunal's satisfaction that there was no material on which the selectors could have based their decision. If there was some material, then, subject to GA, through the selectors, acting reasonably in the manner in which GA's absolute discretion was applied, an appeal brought in reliance on clause 5.2(b)(iv) will fail.
  41. That is the case here. There was extensive material, being competition results, considered by the selectors in respect of both teams. And although there was some criticism levelled at the selectors in oral submissions, apparently based on the fact that (it was suggested) two of the selectors no longer held brevet accreditation as judges in rhythmic gymnastics with the sport's international governing body (*Fédération Internationale de Gymnastique (FIG)*) and one selector was not an FIG accredited judge at all, there was no separate ground of appeal raised that GA breached the Selection Policy by appointing the three selectors that it did. Indeed during the hearing the Tribunal indicated that GA was free to choose the selectors it wished and that any perceived lack of expertise was one that applied to all teams. There was no evidence that the selectors had not acted fairly, and indeed the Tribunal does not accept the oral argument advanced that there was any lack of appropriate expertise amongst the selectors. There was no evidence led to support such a contention.
  42. Thus, the real issue was whether the results achieved by Aspire relative to Premier Group in the events leading up to the selection decision were so overwhelmingly in Aspire's favour that there was no plausible reason as to why Aspire would not be selected so that the Tribunal could conclude only that the Selection Policy had been misapplied.

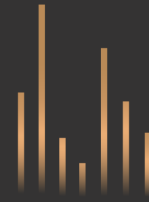


43. In oral argument, expressions such as “no brainer” and “no choice” were used to describe the perceived obviousness that Aspire should have been selected. It was also submitted that GA had simply “disregarded” Aspire’s results.
44. The Tribunal does not agree with either submission.
45. The starting point is the summary of results helpfully prepared by Aspire (with one correction pointed out by Ms Wong on behalf of Premier):

46.

Aspire SNR GRP			Premier SNR GRP		
Tashkent World Cup			Athens World Cup		
Qual	Hoop	25.40	Qual	Hoop	25.20
Qual	Ribbon & Ball	25.30	Qual	Ribbon & Ball	20.80
Finals	Hoop	23.75	Finals	Hoop	Did not qualify
Finals	Ribbon & Ball	24.05	Finals	Ribbon & Ball	Did not qualify
Thais Grand Prix			Aphrodite Cup		
Qual	Hoop	25.60	Qual	Hoop	23.75
Qual	Ribbon & Ball	22.80	Qual	Ribbon & Ball	15.50
Finals	Hoop	Did not qualify	Finals	Hoop	26.15
Finals	Ribbon & Ball	22.80	Finals	Ribbon & Ball	15.55
Australian Gymnastic Championships (AGC)			Australian Gymnastic Championships (AGC)		
	Hoop	27.25		Hoop	25.65
	Ribbon & Ball	22.80		Ribbon & Ball	24.70

47. Whilst not a specified Selection Event, GSA also considered the Queensland State Championships conducted between 24 and 26 March 2023 (because it gave the chance for a “head to head” in competition comparison) in which Aspire achieved an all-around score of 45.0 and Premier Group achieved 44.350.
48. GA also considered one VSA uploaded on 24 January 2023 in which Aspire scored 52.4 Premier Group scored 43.2.
49. As was explained in oral submissions, for the purposes of a VSA, routines are submitted, usually not performed in a competition environment and are used to gauge the stage at which a team might be at, either in preparation for an event, or in the development of a new routine and/or combination. Their value to GA is in the commonality of the judging panel which therefore produces a more reliable standard assessment than comparison of scores achieved by different teams from competitions where only one team competed. This is so, according to GA, even though the higher the competition (for example World Cup events) the higher the general accreditation of the judging panels will be.
50. With respect to all of these results, Aspire drew attention to the difference (which was accepted) between the quality of competition and the accreditation of judges at Group 2 events (Word Cup, World Championships) as opposed to Group 4 events (regional events and national championships). In this context Aspire made the following submissions:



- (a) the Applicants recorded the highest score for the Hoop routine (achieved at the Australian Championships) and Ribbon and Ball routine (achieved at the Tashkent World Cup);
- (b) the lowest score achieved at national or international level by:
  - (i) the Applicants in the Ribbon and Ball routine was 22.6;
  - (ii) Premier Group in the Ribbon and Ball routine was 15.5, resulting in a difference of 7.1 points;
  - (iii) the Applicants in the Hoop routine was 22.8;
  - (iv) Premier Group in the Hoop routine was 22.4, resulting in a difference of 0.4 points;
- (c) in the Video Selection Activity uploaded on 24 January 2023:
  - (i) The Applicants' all-around score was 52.4;
  - (ii) Premier Group's all-around score was 43.2, resulting in a difference of 9.2 points,
- (d) the Applicants had qualified for the finals in the following events:
  - (i) Tashkent World Cup (Group 2 Event) – Hoop;
  - (ii) Tashkent World Cup (Group 2 Event) – Ribbon and Ball;
  - (iii) Thiais Grand Prix (Group 4 Event) – Hoop,meaning that the Applicants reached the finals of international events 3 out of 4 occasions;
- (e) the Premier Group:
  - (i) Did not qualify for a final in a Group 2 Event;
  - (ii) Qualified for the final in the Aphrodite Cup – Hoop only,meaning that the Premier Group reached the finals of international events on 1 out of 4 occasions, and only in respect of a Group 4 Event.
- (f) the Applicants were the first ever Australian Rhythmic group to qualify into a World Cup final for both apparatus routines on or around 17 April 2023 at the Tashkent World Cup. This was achieved only 5 weeks prior to the date that the World Championship team was selected;
- (g) the Applicants placed 5th out of 10 competitors at a Group 2 international Event;
- (h) Premier Group placed 14th out of 14 competitors at a Group 2 international Event and 4th out of 4 competitors at a Group 4 international Event;

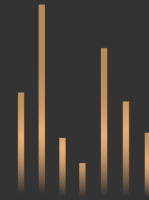




- (i) the Applicants beat Premier Group at the Queensland State Championships in March 2023 by 0.650 points;
- (j) the Australian Championships comprised of a very shallow pool of competing teams (three (3));
- (k) the Applicants comprise of a former Olympian, Youth Olympian and Commonwealth Games Silver medals who have demonstrated that they are capable of performing at a high level in international competitions;
- (l) the Applicants achieved scores over 50 on three (3) occasions, whereas the Premier Group only achieved that score on one (1) occasion (at the Australian Championships);
- (m) the Applicants, overall throughout the selection period, performed consistently at a higher level than Premier Group;
- (n) apart from the narrow (0.3 points) victory that Premier Group achieved over the Applicants at the Australian Championships, at which the Applicants achieved a higher score in the Hoop routine, no other results data throughout the entire selection period favoured Premier Group over the Applicants.

51. As to this analysis, GA responded that what was “presented is selective usage and interpretation of the results. The selectors did consider all events in the policy as stated in their Reasons for Decision.” GA also produced a table highlighting the differences in the national teams that competed at the two World Cup events identified in the above table.

Athens Greece World Cup 17-19 March		5 hoop	3 Ribbon	AA Total	Tashkent Uzbekistan World Cup 14-16 April		5 hoop	3 Ribbon	AA Total
1	Israel	36.500	28.950	65.450	1	China	34.450	29.050	63.500
2	Bulgaria	33.950	30.750	64.700	2	Germany	29.600	28.100	57.700
3	Brazil	35.000	28.850	63.850	3	Uzbekistan	29.050	28.250	57.300
4	Italy	34.850	27.850	62.700	4	Azerbaijan	28.500	25.200	53.700
5	Ukraine	34.800	27.800	62.600	5	Australia (Aspire)	25.400	25.300	50.700
6	Poland	33.450	29.050	62.500	6	Kazakhstan	23.850	25.650	49.500
7	Greece	33.050	28.200	61.250	7	Finland	26.550	20.600	47.150
8	France	31.250	27.100	58.350	8	Türkiye	24.950	21.450	46.400
9	Japan	32.400	25.650	58.050	9	Estonia	21.400	20.950	42.350
10	Azerbaijan	29.800	26.450	56.250	10	USA	22.850	19.100	41.950



11	Germany	33.550	21.800	55.350					
12	USA	30.100	20.900	51.000					
13	Georgia	27.150	21.250	48.400					
14	Australia (Premier)	25.200	20.800	46.000					

52. What this table demonstrates, GA submitted is that:
- based on [https://www.gymnastics.sport/site/rankings/ranking\\_rg.php](https://www.gymnastics.sport/site/rankings/ranking_rg.php), 8 teams competed in Athens ranked in the top 10 whilst in Tashkent there were 3;
  - the highest finisher in Athens who was also in Tashkent was Azerbaijan. Azerbaijan's score decreased by 1.55 between events yet their placing went up 6 places;
  - Germany placed 11th at Athens and 2nd in Tashkent but only improve by two points;
  - in Athens the average Brevet level of the judges was 1.9 whereas in Tashkent the average Brevet level was 2.33; and
  - the top 8 in qualification progress to final. In Athens a score of 58.350 was required to make finals. In Tashkent a score of 46.4 was required to make the final. The Aspire score in Tashkent would have placed them in 13th place and thus not qualifying for finals.
53. GA submitted that a comparison of scores across different competitions in which the teams did not compete against each other is of limited utility and can produce anomalous results. This type of anomaly is something with which sports which have a subjective element to them will always have to deal. As the Tribunal understood the submission of GA, the very fact that judges with the same accreditation will score routines differently (hence the use of multiple judges to produce an average score) means that the more important result is the individual placings within a competition considered along with the quality of the teams competing that provides a more reliable indicator as to how a team has performed rather than simply accepting the particular score achieved on a particular day at a particular event. For this reason, GA also considered the quality of the teams competing in Athens (despite Premier Group placing 14<sup>th</sup>) as opposed to the teams in Tashkent where Aspire placed 5<sup>th</sup>.
54. In reply, Aspire made the valid point that it was not clear whether the teams from Azerbaijan and Germany which apparently competed in both events, were in fact the same teams from those nations or not. The Tribunal agrees, but that submission only serves to highlight the point that rigid adherence to the pure analysis of numerical scores is but one way to justify selections in sports such as rhythmic gymnastics, but such an approach is apt to mislead when the scores are from different times, different events and different judging panels. Further, depending on how the interpretation is made, adherence to statistics as the primary measure for selection could require an almost limitless series of comparisons including the judging panel, the level of competition, the fatigue of the athletes, the level of development of the routines performed, the time of the year and so on.

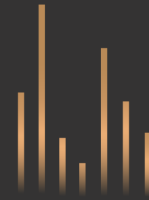


55. As to the approach in fact adopted by the selectors, this was set out in GA's initial response to the lodgement of the Appeal in which it said:

The selectors deemed that:

- Head-to-Head live competition provided the most reliable assessment of the performances of the groups under consideration and as such would carry the greatest weight. These events meant that groups were being considered by the same judging panel on the same day and as such were being assessed on a consistent basis. Also, the more recent (closer to World Championships) a performance, the greater weight it would carry.
- Video Selection Activities – have been introduced in 2023 to provide further data points for selection consideration. These events are identified in Part B Clause 10. These events are submitted by Video and judged by a common judging panel to ensure consistency of assessment/results. Video is deemed to be less reliable than live judging but nonetheless, most importantly, is being assessed by a common judging panel.
- Other Events – these include FIG World Cups, FIG Challenge Cups, Grand Prixes, and other International Events. The international events captured in Part B Appendix One only allow one Australian Group to compete in each competition. These events have different judging panels, occur at different times, and have highly variable depth of fields and as such do not provide a consistent basis for comparison.

56. This summary is consistent with the process recorded as having been undertaken by the selectors in the Selection Nomination/Minutes drafted by Hannah Catchpole and dated 23 May 2023. Ms Catchpole was not required for cross-examination.
57. Whilst some submissions were advanced by Aspire pointing to its demonstrably superior performance in the VSA in January 2023, GA also pointed to the improvement Premier Group had made from that point to the Australian Championships in which it prevailed over Aspire. It seems to the Tribunal that there was no obvious misapplication of the Selection Policy in having regard to this as a fact material to the decision.
58. Further, when regard is had to clause 9.2.2 (set out above) which expressly confers on the Selection Panel the discretion of weighting to be given to the performances at the Selection Events, and the selectors who are experts in the field in fact have determined such weighting in a manner which is (at least) logical and sensible, it is difficult to see how the Tribunal could rationally conclude that the Selection Panel's approach to the selection decision was wrong to the point where it could be considered a misapplication of the Selection Policy.
59. The Tribunal is therefore unable to conclude that the Selection Policy of GA was not properly applied when the decision was made to select Premier Group rather than Aspire to compete for Australia at the World Championships.
60. Further, given the amount of evidence relied on by the Selection Panel, the Tribunal cannot conclude that there was no material on which GA could, and did, reasonably base its decision.



**THE TRIBUNAL THEREFORE DETERMINES:**

1. The appeal is dismissed.

Date: 7 June 2023 (decision given 5 June 2023)



Mr Christopher Johnstone