

NST-E25-260138

Gymnastics Australia v Respondent

Determination

National Sports Tribunal

Appeals Division

sitting in the following composition:

Ms Chris Ronalds AO SC (Chair)

Professor Jack Anderson

Ms Rebecca Ogge

in the arbitration between

Gymnastics Australia

(Appellant)

Represented by Alistair Edgar, CEO, Hannah Catchpole, High Performance Operations Manager and Brett Murphy, Legal Representative

And

Respondent

(Respondent)

Represented by Authorised Representative

And

Interested Party A

(Interested Party)

Represented by parent, and Daniel Maroske, Legal Representative

And

Interested Party B

(Interested Party)

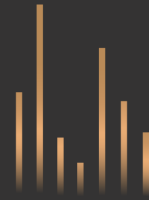
Represented by Authorised Representative

And

Interested Party C

(Interested Party)

Represented by Authorised Representative



INTRODUCTION

1. This is an appeal of a Determination in the General Division of the National Sports Tribunal (**NST**) of 16 May 2025 by Gymnastics Australia (the **Appellant**) of the non-selection of the Respondent to the International Championships.
2. The application to appeal the General Division Determination was validated by the NST, pending receipt of the written reasons from the NST Member. Reasons for the determination were provided to the parties on 20 May 2025, which included the factual background of the matter.
3. The Appellant advised the NST that it must notify the international federation of the final composition of their team on 21 May 2025.
4. The Gymnastics Australia Selection Appeals Policy (**Appellant's Selection Appeals Policy**) (as well as the *National Sports Tribunal (Practice & Procedure) Determination 2024*) provides broad powers to the NST CEO to waive compliance in expedited matters, which has been exercised to progress this appeal.
5. Written submissions were received from the Appellant, the Respondent and Interested Party A.
6. The Panel considered the written submissions and decided that a hearing with the parties was not required.

MERITS

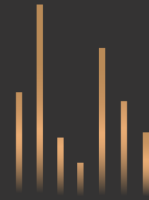
1. Pursuant to clause 5.4(b) of the Appellant's Selection Appeals Policy, the appointed NST Members have determined to deal with this matter on the papers, it being necessary to consider this dispute as expeditiously as the case requires. In this, the NST Members were greatly assisted by the depth and quality of the submissions made by the parties, notwithstanding the complexity of the matter and the tight timeframes faced by all. For that, the NST Members are grateful.
2. Clause 5.2. of the Appellant's Selection Appeals Policy relates generally to "First Instance Appeal to the General Division of the NST". Specifically, clause 5.2 (h)-(k) states as follows:

Selection Appeal Outcomes – Reconsideration and Redetermination

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

(i) Subject to clause 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 GA for reconsideration and redetermination.

(j) In reconsidering and determining the Appellant's non-selection or if required, any broader decision regarding selection of the Team for the Event, GA must observe the principles of natural justice. Any decision made by GA regarding the Appellant's nomination after such referral, is final and binding on the Appellant, subject only to the Appellant commencing an appeal to the Appeals Division of the NST in accordance with clause 5.3.



(k) Notwithstanding clause 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:

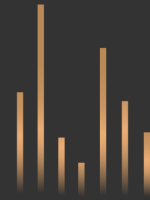
- (i) it would be impractical to refer the selection decision for redetermination to GA given the time available; or*
- (ii) in making its original decision, GA had such disregard for proper application of the Selection Policy Part A and/or Part B that a reasonable person would apprehend that it is unlikely 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.*

(l) Prior to making a determination under clause 5.2(k) the NST must advise the Parties that the NST intends to make such a determination and provide the Parties with a reasonable opportunity to make submissions in relation to the NST's proposed determination. The NST must give proper consideration to any submissions it receives pursuant to this clause 5.2(l).

3. Pursuant to clause 5.2(h), the First Instance Determination upheld the Appeal by the Applicant. The default position under the Appellant's Selection Appeals Policy is, as per clause 5.2(i), that such a matter must be remitted to the Appellant. Clause 5.2(i) is, however, subject to powers reserved to the First Instance NST Member in clause 5.2(k)(i) or (ii).
4. The grounds of this Appeal, made pursuant to clause 5.3 of the Appellant's Selection Appeals Policy, is straightforward. It is not an appeal against the merits of the First Instance Determination, rather it is an Appeal against the First Instance Determination not to remit the matter to the Appellant, as per clause 5.2(i), and instead, itself, determine the issue of the Applicant's selection (by invoking clause 5.2(k)). The Appellant contends that that this non-remittal was an error of law.
5. The rationale for the NST Member to invoke clause 5.2(k) of the Appellant's Selection Appeals Policy, is contained in paragraphs [106]-[120] of the First Instance Determination of 20 May 2025.
6. In the paragraphs [106]-[120], the First Instance Determination explains why the NST Member determined to invoke its powers under clause 5.2(k)(i) and (ii) of the Appellant's Selection Appeals Policy – on the grounds of timing and practicality, and (un)reasonableness.
7. It is also noteworthy that at paragraph 109, the First Instance Determination notes that it gave the parties (on Thursday 15 May 2025), and in line with the requirements of clause 5.2(l) of the Appellant's Selection Appeals Policy, an opportunity to make submissions "in relation to whether, in the event the appeal is allowed, the Tribunal may itself determine the issue of the Applicant's selection or any broader decision regarding selection of the team for the event."

This opportunity to be heard on the specific matter of remittal was availed of by the principal parties to this matter and, as the appeal was allowed, the NST Member then considered the parties' submissions on this point in arriving, ultimately, at its decision to determine the issue itself (see paragraph [110] of the First Instance Determination).

8. The Appellant's appeal is that the First Instance Determination to determine this selection matter itself, and not by way of remittal, was an error of law.



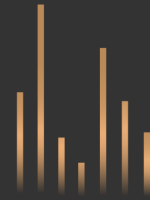
9. With regard to the First Instance Determination that remittal would be impractical given the timing and tight deadlines at issue, the Appellant argues (at paragraph [9] of its submissions dated 20 May 2025) as follows:

The Tribunal's statement is directly contrary to the submissions of the Applicant of 16 May 2025. The Applicant has at all times noted its ability and intention to reconvene the Selection Panel in order to meet all relevant deadlines, and notes that this remains the case. The Applicant has arranged for the Selection Panel to reconvene immediately, pending receipt of the Tribunal's written determination, and in anticipation of the Appeals Panel's decision expected on 21 May 2025. The Applicant confirms that if the Appeals Panel determines to refer the selection decision back to the Selection Panel for reconsideration and redetermination, the Selection Panel will be able to make the decision by the nominations deadline.

10. With regard to the First Instance Determination that remittal would be unreasonable in all the circumstances, the Appellant argues (at paragraph [10] of its submissions dated 20 May 2025) as follows:

The Applicant notes that if the matter is referred back to the Selection Panel as is sought, its intention is to brief the Selection Panel on the reasons why the Tribunal found that the Selection Policy was not properly applied, and to direct the Selection Panel to properly consider those matters in reconsidering and redetermining the decision. This is in keeping with the Applicant's submissions on 15 and 16 May 2025 that it could do precisely this.

11. The NST Panel Members, having reviewed the First Instance Determination and the submissions filed and served in detail, holds that the appeal be dismissed, pursuant to section 5.3(h) of the Appellant's Selection Appeals Policy.
12. The First Instance Determination did not fall into error in exercising its powers, expressly granted to it by the Appellant's own Selection Appeals Policy, to determine the matter itself. The reasons given by the NST Member within the First Instance Determination to determine the matter itself, premised on clause 5.2(k)(i) and (ii) of the Selection Appeals Policy, were based on:
- (a) a close consideration of the relevant facts, evidence and submissions;
 - (b) the product of proper legal reasoning and interpretation of the Selection Appeals Policy and all submitted evidence; and
 - (c) clearly within scope of the jurisdiction of the NST General Division and power under said Selection Appeals Policy. In short, there is no error of law.
13. The NST Panel Members observes that the reasons given within the First Instance Determination, justifying determining the matter itself (timing/practicality and unreasonableness) stand separately, but also can be read in conjunction.
14. The final First Instance Determination was not received by the parties until 20 May 2025. The selection confirmation deadline imposed on the Appellant by the International Federation for the International Championships was 21 May 2025 (or early morning (1am) on 22 May 2025, Australian time) – timing was clearly (as it was for this appeal) of the essence in this necessarily expedited process.
15. If the matter had been remitted, then the Appellant would have had hours, literally, in which to digest the First Instance Determination; reconvene a selection panel; properly and fully (and not



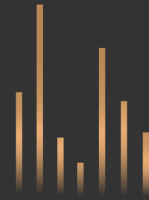
briefly) inform them on how to apply the directions, recommendations and corrective actions contained in the First Instance Determination; then engage in the process of freshly and fully applying the directions of the First Instance Determination in a new, remitted, reconvened selection process; and all up against the selection confirmation deadline imposed by the International Federation (of 21 / 22 May 2025 as outlined in [14]). This above point is also well made in paragraphs 10-12 of the Respondent's submissions to this appeal, noted below and with which the NST Panel Members agree:

10. With regard to the Applicant's statement that "In the event the matter is referred back to the selection panel, GA is in a position to reconvene the selection panel immediately and make a decision in advance of the nominations date", it should be noted that this statement was made prior to it receiving the written decision of the Tribunal, which, as can now be seen, was extensive, comprehensive, and which covered and considered numerous important aspects of the Selection Policy.

11. In particular, it is apparent that there are a number of aspects of the Tribunal's decision which require a detailed and comprehensive review and analysis to be made by the Applicant, a briefing to the Selection Panel of the Applicant (likely led by the Applicant's legal counsel), and which would then further require the Selection Panel to have a discussion, in order to achieve clarification and understanding of these numerous issues, in order to then be adopted and applied correctly, and then thereafter would further require the making a comprehensive re-assessment of eligible athlete performances, based on available and permitted applicable materials related to athlete performance, as required for such a selection decision.

12. The Respondent submits that in practice, this would be difficult to accomplish in a manner as indicated by the Tribunal should have initially been done by the Respondent, in such a short period of time as is now remaining. For this reason, the exercise of the Tribunal's powers under Clause 5.2(k)(i) of the Selection Policy was appropriate in the circumstances.

16. Moreover, it is clear from the First Instance Determination that, although the Applicant succeeded on only one ground of appeal (i.e., the first Ground of Appeal that the Selection Policy Part A and/or Part B was not properly applied by Gymnastics Australia with respect to the Non-Selected Athlete); the gravity and multitude of questionable and inconsistent interpretation of criteria and performance data made by the selection panel – exhaustively reviewed at paragraphs [37]-[89] of the First Instance Determination – meant that remitting the matter, even with detailed instructions on any corrective action that should be taken, would not, within the time available, be practically possible, and would in any event be unreasonable to do so. This point is equally well made by the Respondent at paragraphs [13] and [14] of her submissions.
17. Such were the extent of questions raised by the First Instance Determination as to the methodology used by the original selection panel, that any reconvened selection panel to whom the matter might have been remitted, would have needed much more time and instruction on how to properly comply with, and digest, the First Instance Determination, than the time practically available, and to much more depth than that envisaged at paragraph [10] of the Appellant's submissions: "...if the matter is referred back to the Selection Panel as is sought, its intention is to brief the Selection Panel on the reasons why the Tribunal found that the Selection Policy was not properly applied....".
18. The NST Panel Members hold that such a "briefing" would be inadequate in all the circumstances, and would appear to run the real risk of the decision being made incorrectly for a second time.



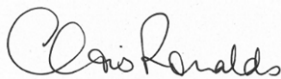
19. In contrast – and contrary to what the Appellant submits at paragraph [18] of their submissions and contrary to the submission of Interested Party A – the First Instance Determination’s instruction as to how the Applicant might now be accommodated in the team (by way of the re-allocation of one apparatus away from one athlete) is a clear, specific and discreet instruction, easily enacted by, but properly remitted to, the Appellant; and moreover, one that is a fair and proportionate outcome in all the circumstances and to all the parties.

THE TRIBUNAL THEREFORE DETERMINES:

1. Pursuant to clause 5.3(m) of the Appellant’s Selection Appeals Policy, this determination is final and binding on the parties.
2. This Tribunal determines, pursuant to clause 5.3(h) of the Appellant’s Selection Appeals Policy, that the Appeal be dismissed.
3. This Tribunal further and specifically determines that order (3) of the First Instance Tribunal Determination of 20 May 2025 be implemented in a timely fashion, and namely that:

The Applicant be included in the Australia team for International Championships, and the apparatus in respect of which the Applicant is compete at those championships be determined by Gymnastics Australia, albeit that will also amend the current selection by removing one apparatus from the two allocated to one of the currently selected athletes.

Date: 21 May 2025



Member Ronalds AO SC



Member Anderson



Member Ogge