

BETWEEN **EDEN WORSLEY**

 Appellant

AND **ARTISTIC SWIMMING NEW ZEALAND**

 Respondent

**DECISION OF SPORTS TRIBUNAL
22 April 2024**

Tribunal John Macdonald (Chair)
 Pippa Hayward

Representation David Fraundorfer, counsel for the Appellant
 Garth Gallaway, counsel for the Respondent

Registrar Helen Gould

1. This decision is being issued after many months of the Tribunal doing its best to accommodate the parties to resolve this matter.
2. The Tribunal now has a case management issue with the case.

Background

3. Eden Worsley (Eden) is a New Zealand representative artistic swimmer who has had a successful career competing around the world and who is regarded as a leader in the sport. She had been selected to compete at three world championships and was part of a duet which earned New Zealand the opportunity to select a duet (Olympic Duet) to compete at the 2024 Olympic Games (Olympics).
4. Having been one of the swimmers that secured the Oceania spot for New Zealand to compete at the Olympics, Eden was hopeful that her long-held dream of competing at the Olympics would become a reality.
5. In September 2023 Artistic Swimming New Zealand (ASNZ) put arrangements in place for trials to select the two swimmers that would make up the duet that would hope to be selected by the New Zealand Olympic Committee (NZOC) to become part of the Olympic team. ASNZ decided not to select the intact duo (Eden and her partner (Eva Morris (Eva)) but to select the two strongest swimmers and join them to create the Olympic Duet, an approach in line with standard international practice. This meant, of course, that Eden's place in the duet was not secure.
6. Along with five other swimmers, Eden participated in trials which were held in two parts: annual squad trials on 27 September 2023, worth 30% of the selection criteria; and a second trial on 28 and 29 October 2023, worth 70% of the selection criteria.
7. Eden was placed fourth of the six swimmers, so she was not selected as part of the duet. Eva was selected along with Nina Brown as they were the top two swimmers. The swimmer that placed third was selected to train with the duet as a reserve.
8. The Tribunal recognises that Eden has worked hard in the sport since she first discovered it 11 years ago and admires the dedication and commitment she has

shown to the sport. Eden told the Tribunal that artistic swimming had become her life and so the Tribunal is sympathetic to the huge disappointment she must feel at not being one of the swimmers nominated to compete for Olympic selection.

9. On 18 December 2023 Eden filed an appeal against ASNZ's decision not to select her as part of the Olympic Duet.
10. A hearing was held on 25 and 26 March 2024 and was adjourned part heard; paragraphs [13-49] address the procedural history of this case in more detail.

Grounds of Appeal

11. Eden appealed ASNZ's decision on the following grounds:
 - a) The selection criteria were not properly followed and/or implemented;
 - b) The athlete was not afforded a reasonable opportunity by selectors to satisfy the applicable selection criteria;
 - c) The decision was affected by actual bias; and
 - d) There was no material on which a decision could be reasonably based.
12. ASNZ disputed these assertions saying that there were clear criteria which were properly followed, that Eden had the same opportunity as everyone else to satisfy the selection criteria and that they had material on which they could base their decision. ASNZ, through its counsel Mr Gallaway, expressed its distress at the allegations of actual bias and predetermination and wanted, above everything else, for the individuals who had been singled out by Eden to have an opportunity to put their side of the story to the Tribunal.

Procedural history

13. Setting out the procedural history of this matter is important because the time it has taken for it to arrive at a hearing and for the negotiations to take place after the hearing was adjourned are relevant to the situation in which the Tribunal now finds itself.
14. The Tribunal was ready and able to hear this matter in early February had the parties also been ready at that point.

15. The Tribunal was first made aware that Eden was likely to appeal ASNZ's decision in November 2023 after the selection announcement was made on the ASNZ Facebook page. The Tribunal advised ASNZ to follow the appeals procedures contained in the selection policy documents relevant to the selection.
16. The Tribunal understands that the first step in the appeal process was for the parties to meet and attempt to resolve the issue between themselves, and that such a meeting took place.
17. On 18 December 2023 the Tribunal received Eden's Notice of Appeal which it advised also needed to be served on ASNZ.
18. The Christmas break intervened meaning that the filing date for Eden's Appeal Brief was 15 January 2024, and it was duly received on that date.
19. Also on 15 January 2024, the Tribunal contacted the parties noting the matter had urgency to it and that consequently the Chair wanted to hold a pre-hearing conference with the parties on 17 January 2024 to discuss how to progress the matter.
20. The pre-hearing was accordingly held and a summary of what was discussed was distributed by email on 18 January 2024.
21. The Chair had thought the pre-hearing had been fruitful in terms of the parties recognising the urgency of the case and what he had understood to have been a suggestion by ASNZ to hold a re-trial.
22. In an email dated 18 January 2024 ASNZ indicated to the Tribunal that they had not suggested holding a re-trial but had said they would hold one if instructed. At that point the Tribunal recognised that the matter would not be resolved without a hearing and so a further pre-hearing conference was scheduled to arrange the hearing.
23. On 19 January 2024 the Tribunal received notice from Eden that she had engaged Mr Fraundorfer as her counsel to assist.

24. What followed were email communications and efforts by the Tribunal to set up a pre-hearing conference and there was an agreement that ASNZ's Form 5 statement of defence would be filed by 2 February 2024.
25. On 1 February 2024, the Tribunal received an email from Mr Fraundorfer setting out an agreed timetable for the proceedings. The timetable stated that Eden would file an amended Form 4 by 9 February 2024, ASNZ's Form 5 should be filed by 16 February 2024, Eden was to file her evidence by 28 February 2024, ASNZ was to file its evidence by 8 March 2024 and a two-day hearing was to be set down for a date after 13 March 2024 followed by the filing of written submissions three days after the hearing.
26. The agreed timetable indicated that the Tribunal's intention to deal with this matter urgently was seemingly not shared by the parties. The Tribunal set down the two-day hearing for the 25 and 26 March 2024, being the earliest dates after 13 March 2024 when all three panel members were available.
27. On 15 February 2024, the Tribunal received a request for a filing extension from Mr Gallaway, but all other dates were to remain the same and in the absence of any opposition to that request the Tribunal extended ASNZ's filing date to 21 February 2024; ASNZ's Form 5 and supporting documents were filed on 21 February 2024.
28. Eden did not file her evidence on 28 February 2024 as directed and, following an enquiry from the Tribunal, Mr Fraundorfer requested new timetabling which he had agreed with ASNZ for Eden's evidence to be filed by 11 March 2024 and ASNZ to file by 20 March 2024; the Tribunal Chair granted the changes.
29. The Tribunal has always accepted the need for urgency in dealing with this appeal because Eden was anxious to overturn the decision in time to meet the relevant selection criteria for the Paris Olympics. The Tribunal understood her ultimate goal was Olympic selection.
30. The need for urgency and the goal of selection is also in keeping with the wording of Rule 49 where, in the event of a successful appeal, the usual practice of the Tribunal referring it back to the NSO for determination need not be followed if it would be impracticable in the time available.

31. In the present case, however, the Tribunal perceived that the need for urgency had disappeared at least by the time the hearing date had been set for 25 and 26 March 2024.
32. In respect of Olympic selection, being Eden's ultimate goal, a dispute arose as the hearing approached as to whether there was still time for her to meet the selection criteria. ASNZ held the strong view that it was too late, which meant there was no point in the appeal proceeding any further. This was especially so as an independent review of the selection process was about to be undertaken, which would deal with the various concerns Eden had raised. ASNZ therefore sought an adjournment until the review had been completed, but with Eden still retaining the ability to bring any outstanding issues back to the Tribunal.
33. Eden disputed that it was too late and an email from Mr Fraundorfer set out how they believed she was still able to meet the selection criteria.
34. The application for an adjournment came less than a week prior to the hearing date and it presented as an issue which could take some time to resolve, with the possibility that evidence might need to be called. Given those circumstances the Tribunal determined that the hearing should proceed, with the issue of whether Eden was still able to gain Olympic selection being put to one side. The Tribunal left it open to counsel to further pursue the adjournment application immediately prior to the hearing but that did not occur.
35. Evidence was heard on the first hearing day which finished with Eden still under cross-examination.
36. It emerged on the morning of the second day that ASNZ had acknowledged there could be an error with the recording of trial scores which required further investigation, an issue which was raised by Mr Fraundorfer in his opening statement.
37. The hearing did not resume as planned that day because counsel entered discussions, at the end of which the Tribunal understood that ASNZ had made a proposal to resolve the matter, but a final decision had yet to be made.
38. The hearing was adjourned part heard, with counsel directed to inform the Tribunal of the outcome of negotiations by 5.00pm on Thursday 28 March 2024.

39. By 2 April 2024 the Tribunal had not heard from the parties so made an enquiry as to whether it would be required to be further involved in the matter; the Tribunal was informed that negotiations were still ongoing. Following further enquiry by the Tribunal on 8 April 2024, it was informed that negotiations had fallen over and dates were requested to complete the hearing.
40. This led to an urgent pre-hearing conference with counsel on 11 April 2024, which was more than two weeks after the hearing had been adjourned. Significantly, Mr Fraundorfer conceded that there was now insufficient time for Eden to meet the selection criteria. In response, Mr Gallaway submitted the appeal was now moot and should be brought to an end.
41. After further discussion the Chair invited written submissions on the issue from counsel by 5.00pm on 16 April 2024.
42. Written submissions were received on 16 April 2024 from both parties.
43. In his submission, contrary to his concession at the pre-hearing conference, Mr Fraundorfer argued that it was still possible for Eden to be selected for the Olympics. Mr Gallaway's submissions focused on whether Eden's appeal was moot as he had been under the apprehension that Mr Fraundorfer had conceded the issue of selection.
44. Given that Eden was still pressing for selection to the Olympics and was maintaining that it was still a possibility (with little regard to the possible impact on Eva and Nina if she were to be selected), the Tribunal was of the view that it should continue to hear evidence on the matter so that the merits of the case could be determined. The Tribunal was also mindful that further allegations had been made against ASNZ (that they had 'tricked' Eden into the adjournment) which they may wish to defend. The Tribunal was further aware that Tara Pryor of NZOC was being called as a witness by ASNZ and so the matter of whether Eden could realistically still be selected for the Olympics could be tested.
45. Accordingly, the Tribunal agreed to urgently reconvene the hearing the following week with the preferred option being Wednesday 24 April 2024. The Tribunal also indicated its willingness to sit on Anzac Day or in the weekend.

46. It took further prompting from the Tribunal to get a response as to whether the parties would be ready to proceed.
47. Not unreasonably Mr Gallaway informed the Tribunal that he was unavailable on any of the suggested dates due to prior commitments.
48. This presents the Tribunal with a significant problem in that the Chair is going overseas on 30 April 2024 for five weeks. Counsel was made aware of this during the conference of counsel on 11 April 2024 and in writing on 17 April 2024.
49. Given none of the available dates before his departure are suitable for the parties, the matter cannot be heard until the Chair returns in the first week of June, by which date Olympic selection will be impossible.

Discussion

50. The Tribunal has been at pains to describe the procedural history and its own role in the proceedings because it has done everything it can to hear this matter first under urgency, and second in a timely manner.
51. The Tribunal allowed the adjournment of the hearing in the interests of the matter being resolved between the parties so that there may be some chance that relationships could be restored, in the knowledge that it might be asked to continue the hearing at some point.
52. As set out in [38-39], the Tribunal had expected to hear back from the parties by 28 March 2024 with news either that the matter had been resolved or that the Tribunal was required to continue with the hearing. A further six working days passed before the Tribunal was made aware that it would be required to resume hearing the appeal.
53. In his submissions Mr Fraundorfer suggests that ASNZ caused delays. The account of the procedural history shows that this is not strictly the case, and this is further supported by Mr Gallaway's account of the procedural history in his email dated 18 April 2024.
54. The Tribunal considers ample time has been afforded to bring this matter before the hearing panel and to return to the panel for the hearing to resume. It appears to the

Tribunal that, for whatever reason, the pursuing of this appeal has not been afforded the urgency it required and that there is now no prospect of Eden being selected for the Olympics.

55. In his submissions Mr Fraundorfer pointed out that Eden had a right to appeal to the Tribunal which the Tribunal could not refuse to hear. The Tribunal accepts this and pointed out in an email of 17 April 2024 that it had not refused to hear the appeal it had merely been adjourned part-heard.
56. Rule 30 of the Tribunal Rules provides (i) that the Tribunal may regulate its procedures as it thinks fit; (ii) the Rules shall be construed as to secure the just, speedy, and inexpensive determination of any Proceeding; and (iii) where any matter is not otherwise provided for in the Rules, the Tribunal shall have jurisdiction to make such orders or give such directions as it considers to be consistent with the just, speedy, and inexpensive determination of the Proceeding.
57. Whether the Tribunal can stop hearing an appeal once it has been commenced is not specifically covered in the Rules, but it considers it can do so having regard to rule 30 which gives it jurisdiction to make such orders and directions that are consistent with the just, speedy and inexpensive determination of the proceeding, while observing the principles of natural justice.
58. The opportunity to be heard and to be treated fairly applies to both parties in the proceedings. The Tribunal has dedicated significant time and resources to ensuring that the parties have been heard and has been concerned to act with fairness at all times. That the matter has reached the point where it can no longer be heard within the practical timeframes does not lie at the feet of the Tribunal.
59. Eden sought an outcome that she be selected to go to the Olympic Games. The Tribunal had such a remedy available to it at the outset of this process as provided for by Rule 49 but those remedies are no longer available to the Tribunal due to the passage of time.
60. The Tribunal is reassured, however, that Eden's voice will be heard in every other respect in relation to this matter within the framework of the independent review which is under way.

61. In summary, the Tribunal considers it has run out of time to hear the appeal; in any event, there are no longer remedies available that could be granted to Eden if she was successful.

Conclusion

62. The appeal is dismissed with costs being reserved.

Dated: 22 April 2024



John Macdonald
Chair



Pippa Hayward
Member