SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)

No: SDRCC 16-0298

Keegan Christ
(Claimant)

and

Speed Skating Canada (SSC)
(Respondent)

and

Steven Dubois
Marc-Olivier Lemay
(Affected Parties)

RULING ON COSTS

1. On August 29, 2016 I issued a Short Decision to the effect that the decision of the High Performance Committee Short Track of the Respondent (the "HPCST") made in May and/or June, 2016 to not name the Claimant to the National Development Team should be set aside. I also exercised my power under Article 6.17 of the *Canadian Sport Dispute Resolution Code (January 1, 2015)* (the "Code") to name the Claimant to the National Developmental Team.

2. On September 6, 2016 I issued my Reasons for Decision.

3. Between the time that I issued my Short Decision and my Reasons for Decision, the Claimant advised that he wished to reserve the right to seek costs and make a submission on the issue.

4. After I issued my Reasons for Decision, the Claimant next applied under Article 6.23 of the Code to seek clarification of the award. That led to submissions being made and me issuing Reasons for Decision on that application on September 27, 2016, where I rejected the Claimant's application for clarification.

5. Subsequently, I received and have had the opportunity to review submissions from the parties on costs, and so can now issue a Ruling on Costs.

6. I have set forth in detail the steps taken in the proceedings, in order that anyone reading this can appreciate the reason for the delay in issuing the costs award.

7. To start with, I note that Article 6.22(c) of the Code addresses costs as follows:

> (c) The Panel shall determine whether there is to be any award of costs and the extent of any such award. When making its determination, the Panel shall take into account the outcome of the proceedings, the conduct of the Parties and their respective financial resources, intent, settlement offers and each Party's willingness in attempting to resolve the dispute prior to or during Arbitration. Success in an Arbitration does not mean that the Party is entitled to be awarded costs.

8. In his October 4, 2016 submission on costs (made through counsel) the Claimant sought a total of $11,324, inclusive of professional fees and disbursements. This was broken down to include one lawyer at $200 per hour (for 14 hours), another lawyer at $500 per hour (for 14 hours), as well as the 13% HST and the $250 filing fee. The amount claimed did not include anything with respect to the application for clarification of the award.

9. In asking for costs, the Claimant argued that the outcome of the proceedings supported an award, as he had been successful.

10. As to conduct of the parties, the Claimant asserted that the Respondent had not properly and/or in a timely matter brought forth documentation that should have been brought forth in this hearing, and had also relied upon improperly drafted and improperly applied selection criteria.

11. As to the financial resources of the parties, the Claimant presented himself as a young man of limited means.

12. The Claimant asserted that intent should be interpreted broadly so as to include not only bad faith (which I note was specifically not found to be in play here) but also as evidenced by policies and decisions which knowingly violate law, such as human rights law. The Claimant emphasized his perspective that this case involved an established breach of human rights law.

13. The Claimant argued that it is important that athletes have access to experienced legal counsel in sporting matters, especially early in their careers. He emphasized that the Respondent needed to bear responsibility for a poorly drafted selection policy and the application of that policy.

14. For its part, the Respondent objected to any award of costs. Its position was that the Claimant through counsel, was portraying an "extreme view"

of the Respondent's conduct so as to justify what it saw as an "extraordinary request" for legal fees.

15. The Respondent emphasized its own choice not to retain legal counsel as the cost of doing that would potentially have been significant and it felt such resources would be better utilized to benefit athletes.

16. The Respondent noted that it had already contributed almost $12,000 to this matter, including future support to the Claimant as a result of his successful claim and the costs of an internal appeal which it had undertaken prior to the claim being referred to the SDRCC.

17. The Respondent stated that the financial benefit for the Claimant is $5,400, whereas the claim for costs is well over double that. It questioned the value Claimant's counsel brought in that context. It also emphasized its view that in sport there is a general "understanding" that parties to a dispute will work towards resolutions in a cost effective manner, and that any decisions against a Respondent (including any awards of costs) are intended to benefit the athlete or the sport system that supports the athlete. It contrasted such an investment in the athlete or the system and payment for legal fees.

18. Article 6.22 of the Code has been considered in a variety of cases to date, and in particular *Boylen* v. *Equine Canada SDRCC 04-0017 (Pound Q.C.), Hyacinthe v. Athletics Canada and Sport Canada SDRCC 06-0047 (Pound Q.C.) and Laberge v. Bobsleigh Canada Skeleton SDRCC 13-0211 (Mew).*

19. These cases support the following principles:

    a) While the outcome of the proceedings is the primary consideration when determining an award for costs, generally parties should bear their own costs from matters arising under the Code. This is so as not to inhibit an athlete from seeking recourse under the Code, fearing an award of costs should he/she prove unsuccessful.

    b) Actions which lead to needless legal expense being incurred can lead to costs being awarded, even in favour of the unsuccessful party.

    c) Solicitor/client costs are awarded only in exceptional circumstances, such as where the conduct of one party has been unprofessional or when the unsuccessful party has refused reasonable offers of settlement or otherwise acted objectionably or in bad faith.

    d) The "indemnity" principle requires that costs are only paid with respect to actual costs which have already been paid or are payable under the retainer between the party and the lawyer. If in fact the lawyer's retainer was on a *pro bono* basis, costs other than reimbursement of the filing fee under the Code would not be payable.

20. In *Meisner et al. v. Equine Canada SDRCC 08-0070 (Pound Q.C.)*, it was stated that:

> It is important for parties using the arbitration process available through the SDRCC understand the basis on which costs may be awarded to a party. It does not follow that a "win" automatically leads to an award of costs in favour of the party which has been successful. The basic principle [is] that the parties are responsible for their own costs and for the costs of their witnesses. [at page 3]
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> […]
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> The dispute was genuine and not concocted. The issue had important potential consequences for the Claimants and possibly for one or more of the affected parties. There had been significant changes in the selection criteria after they had been originally issued by Equine Canada, one of which, in particular, had the potential to prejudice the Complaints. It had not been possible to negotiate an acceptable compromise, so the only recourse was litigation. Litigation costs money. It costs more money when lawyers become involved. That is a fact of modern life. The SDRCC and the Code attempt to provide a process for resolution of sport-related disputes that is as convenient and inexpensive as possible, using resolution facilitators and arbitrators experienced in sport matters. The process is made as informal as possible, consistent with principles of natural justice and basic rules of evidence. But it still involves inherent costs. Asserting one's rights and defending one's actions in a system governed by the rule of law comes with a price. This fact is recognized in the Code at Article [6.22(a)].
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> I have awarded costs in other cases, particularly in favour of athletes, when the circumstances demonstrated that there was no reasonable basis for the claim as filed, where the actions of a national federation and Sport Canada had put an athlete to needless expense, or where the actions of a national federation had led an athlete to exposure to litigation in the courts that should never have occurred and that would not have occurred had the national federation acted in accordance with the dispute resolution system to which it was a party. On the other hand, as part of keeping the cost of resolving disputes as efficiently and inexpensively as possible, I do not believe it is desirable to routinely award costs in every case, especially where there is a dispute that is genuine and not tainted by bad faith. [at page 8]

21. In *Hyacinthe v. Athletics Canada, Sport Canada SDRCC 06-0047 (Pound Q.C.),* the Claimant sought costs on a solicitor and client basis rather than simply costs in the cause, and so effectively sought a full indemnity for all costs incurred in the process, as opposed to costs payable as per tariff. Essentially, that is what was requested in the present case.

22. In *Hyacinthe*, Arbitrator Pound noted that the Code has no specific tariff of costs. Instead, it simply leaves the matter to the discretion of the arbitrator, though firstly of course requiring the arbitrator to determine whether or not there should be any award for costs, and in coming to that determination, to consider those factors set forth in Article 6.23 (now Article 6.22) of the Code.

23. Arbitrator Pound noted that in most cases costs are not ordered but did accept that there had been circumstances where sports organizations had acted so as to financially prejudice athletes. If so, it was appropriate that they assumed some of the financial responsibility for their actions, as an exception to the general practice.

24. In *Hyacinthe*, the Respondent argued that for the Claimant to have retained expensive legal counsel and incurred legal fees 3 times the amount of the claim, and then to expect other parties to pay such fees, was totally unreasonable and could amount to an abuse of process. In response, the Claimant suggested that the claim was complicated, that much more was at stake because one had to look at things over a longer term basis, and that there was a matter of principle involved.

25. As to the request for costs on a solicitor and client basis, Arbitrator Pound noted that:

> Such costs are awarded only in exceptional cases, such as where the conduct of the other party has been unprofessional, or where the losing party has refused offers of settlement or has been otherwise objectionable or in bad faith. It is entirely possible for there to be good faith disagreements as to facts and appropriate outcomes and that such disagreements can only be resolved by a third party, such as a court or arbitrator, in which one party is successful and the other not, or there is a shared outcome. This does not mean that the losing party must indemnify the winning party in respect of all expenses incurred in the course of the dispute. Ordinary court tariffs recognize the principal that the losing party is bound to make some, but less than total, contribution to the expenses of the winning party. Having no evidence as to bad faith on the part of either Respondent, I do not think that costs on a solicitor-client basis are appropriate in this matter. [at page 18]

26. In *Strasser v. Equine Canada SDRCC 07-0056 (McInnes),* the Claimant won her appeal and requested an order for costs of more than $60,000. Most of this was for costs involved in the proceedings leading up to the SDRCC arbitration, with only $8,000 related to that arbitration. Overall though, the claim was for costs on a solicitor and client basis. Like in *Hyacinthe*, Arbitrator McInnes felt that solicitor and client costs should only be awarded in unusual circumstances, which was not the case, and so awarded costs of $2,500.

27. Here, I decided in favour of the Claimant, not because of bad faith or misconduct by the Respondent, or any conclusion that the applicable policy was necessarily contrary to human rights or any other law.

28. Rather, my decision was based on the reality that the Respondent had not met its onus of proof as required by the Code to prove that the criteria to be considered were properly established and that the selection decision in question was made as per those criteria. As a result, it lost and the Claimant won.

29. Based on the facts that were before me, I believed that the decision was wrong and there could be no conclusion other than that the Claimant deserved to be on the National Developmental Team. As a result, rather than sending it back to anyone for what was to be the inevitable, and delaying things further, I placed the Claimant on the team. I stated that:

> I find overall that on the evidence before me the Claimant should have been considered as superior on both criteria of international events and national ranking. On long term potential for podium performance, arguably the other athletes had the edge. Had the Respondent followed the criteria as required it should have selected the Claimant for the Development Team. This is inescapable from the evidence before me and there is no reason to send it back to the Respondent to make that decision, as candidly, there could be no other decision made based on the evidence in this case. [at para. 70]

30. In terms of the Claimant's argument for costs, I find that the outcome of the case is most relevant, as would be the resources of the Claimant. He appropriately brought a claim forward and, despite being of limited means, properly chose to retain highly qualified legal counsel, who certainly assisted in his success here. As a result, he should receive some reimbursement for costs he incurred in the process.

31. I specifically find that conduct of the Respondent has no application to my decision here. The Respondent produced in a timely matter the required documentation that it had (which candidly did it no good and certainly benefitted the Claimant in the case). I did not find the selection criteria to be improperly drafted so much as less than ideally drafted, and improperly applied here. My comments on drafting were intended to encourage more precision in addressing the use of discretion.

32. As to intent and the alleged knowing violation of human rights law, I find that such characterization inaccurately describes what occurred here. Age can be a valid factor on which to base discretions, but as noted, the Respondent failed to convince me that it was properly considered here. This is far different than having a policy which on its face blatantly and without any credible saving argument, is discriminatory.

33. While the Respondent chose not to incur the costs of legal counsel, this does not in any way lead to the conclusion that it should be somehow immune from reimbursing the Claimant for some of the legal costs he properly incurred in his successful claim against it. The Respondent made its choice for better or worse and that has nothing to do with the Claimant's entitlement to costs. I make no deduction from the cost award on the basis that the Respondent chose not to engage legal counsel.

34. It is true that the Respondent has already incurred some expense due to the internal appeal procedure, but that comes with the territory of being a National Sport Organization. These internal appeal processes are required and a cost of doing business. Indeed, one could say that if the decision had been made properly to begin with, then these additional costs would not have been incurred.

35. The fact that the Respondent now is required to pay some money to the Claimant (related to being on the National Developmental Team) that he otherwise would not have received is likewise not relevant to the costs award. He has a right to this money as a result of being named to the National Developmental Team, and would have it whether or not there is a cost award. There is a distinction between damages and costs. I make no discount at all from the costs awarded on the basis that the Claimant has received some financial benefit from his successful claim.

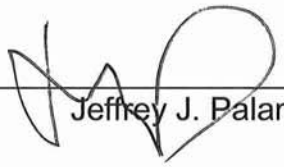
36. As to the value of the case, the Claimant's use of legal counsel and cost effective resolutions benefitting the athlete or staying within the sport, I find it wholly appropriate that legal counsel was retained and have no issue at all with the Respondent paying the cost of that, at least in part. While the Respondent may say that the cost is too much, the fact remains that there would have been no cost whatsoever if it had acted appropriately in its original decision. The file now costs what it costs, due to the Respondent's actions.

37. However, while the Claimant should have some of his costs, he should not be fully reimbursed for whatever costs might be claimed. The system does not guarantee <u>any</u> reimbursement as cost awards are not automatic, and full indemnification is very exceptional. Simply because legal counsel proposes or charges a certain fee does not mean that such fee must be paid by the losing party in a proceeding such as this.

38. There is a cost to litigation which is not recoverable, even in the case of success. I am not prepared to provide an award here which effectively indemnifies someone for a legal bill based on 2 lawyers for 28 hours (14 hours each) at a combined hourly rate of $700 for such representation. While in different circumstances this may be extremely appropriate, in this context it is not. Respectfully, I think in the circumstances that the cost of a single lawyer would be appropriate at a rate of $250 per hour.

39. As a result I order that the Respondent pay legal costs to the Claimant for a single lawyer at a rate of $250 per hour for a total of 14 hours, or $3,500, together with HST of 13%, resulting in a total of $3,955. In addition, there should be reimbursement of the $250 filing fee and so a total cost award of $4,205.

Signed in Winnipeg, this 25th day of October, 2016.



Jeffrey J. Palamar, Arbitrator