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

Nº SDRCC 20-0437

Between:

DAVE GRESZCZYSZYN
(CLAIMANT)

– and –

BOBSLEIGH CANADA SKELETON (BCS)
(RESPONDENT)

– and –

KEVIN BOYER
BLAKE ENZIE
MARK LYNCH
KYLE MURRAY
LANETTE PREDIGER
(AFFECTED PARTIES)

Tribunal: Patrice Brunet (Sole Arbitrator)

Appearances

For the Claimant:	Dr. Emir Crowne Amanda Fowler
For the Respondent:	Alexandra Logvin Gabrielle Cyr
For the Affected Party (Lanette Prediger):	James Smellie

JURISDICTIONAL AWARD

1. The Claimant challenges the Respondent's decisions of not selecting him for the 2019-2020 World Cup Team and of not paying him for four months of Summer Carding ("Back Pay").

2. On November 9, 2019, the Claimant was informed by the Respondent that he was not selected to compete on the 2019-2020 World Cup circuit.

3. On November 17, 2019, the Claimant was informed by the Respondent that, because he had not been selected for the World Cup Skeleton Team, he would not receive Back Pay for the pre-season 2019-2020 cycle.

4. On November 27, 2019, the Claimant filed a Notice of Appeal by email for both decisions rendered by the Respondent on November 9, 2019, and November 17, 2019. At the time of filing the Notice of Appeal, the Claimant stated that payment of the $100.00 filing fee "would follow".

5. On December 2, 2019, the Respondent acknowledged receipt of the Claimant's Notice of Appeal but informed him that the Appeal procedures were not triggered, since the filing fee had not been completed.

6. On December 19, 2019, the Claimant paid the filing fee of $200.00 at the Respondent's office, corresponding to 2 appeals (the decisions rendered on November 9 and 17, 2019).

7. On January 9, 2020, the Respondent rendered a decision whereby it determined that the 10-day limitation period for appeals was upheld and that since the filing fee had not been paid contemporaneously with the appeal of the November 17 decision, it was rejected. As a result, the Respondent refused to initiate appeal proceedings for both the selection and the carding decisions. BCS also analyzed the appeals under Section 6 of its Appeals Policy, which allows for the consideration of an appeal on a discretionary basis, but declined to exercise its discretion.

8. In the present arbitration, the Respondent raised an initial objection. It questioned whether the *Sport Dispute Resolution Centre of Canada* (the "SDRCC") had jurisdiction, arguing that the Claimant had not exhausted the internal appeal processes, as per subsection 3.1(b) of the *Canadian Sport Dispute Resolution Code* (the "SDRCC Code").

9. On January 28, 2020, I was appointed Jurisdictional Arbitrator. In addition, during the Preliminary Conference call, the Parties also agreed that I should be appointed as the Arbitrator to hear the case on the merits, if jurisdiction was granted.

10. For clarity, the Respondent then conceded that the jurisdictional objection did not target the SDRCC itself.

11. On February 1st, 2020, before the Jurisdictional Hearing, I informed the parties of the following decision:

> "*After a review of the counsel for Respondent's factum, and more particularly paragraphs 28 and 29, I conclude that there is no longer an objection raised concerning the jurisdiction of the SDRCC to hear this matter.*
>
> *However, the issue of the legitimacy of the athlete's appeal, and whether it should be heard on the merits, remains live, and I need to dispose of it as a matter of preliminary procedure.*
>
> *Therefore, I conclude that there is no longer a dispute regarding the jurisdiction of the SDRCC, and will concentrate the scheduled call to establish a calendar of proceedings for representations regarding the eligibility of the athlete's appeal, without going to the merits.*
>
> *There will be no cross-examination of the witness during this call.*
>
> *I remain at the service of the Parties for an accelerated schedule of proceedings. However it will not be possible to compress the calendar to*

accommodate the Claimant for a decision to be rendered before the upcoming weekend."

12. On February 6, 2020, the hearing on the admissibility of the Appeals was held between myself and the Parties by conference call, in the presence of an SDRCC representative.

13. The questions are posed as follows:

    i. Should the Claimant's Notice of Appeal regarding his non-selection (decision dated November 9, 2019) have been deemed receivable and dealt with under the Appeals Policy?
    ii. Should the Claimant's Notice of Appeal regarding his carding eligibility (decision dated November 17, 2019) have been deemed receivable and dealt with under the Appeals Policy?

14. Although I do not refer in this decision to every aspect of the parties' submissions and evidence, in reaching my conclusions and in making my decision I have considered all of the evidence, arguments and objections presented by them in this proceeding.

I. APPEAL OF THE NON-SELECTION DECISION (the November 9, 2019 decision)

15. On November 9, 2019, the Claimant was informed by the Respondent that he was not selected to compete on the World Cup circuit for the 2019-2020 season.

16. No further communications were exchanged between the Parties until November 27, 2019.

17. On November 27, 2019, the Claimant filed his Notice of Appeal by email to the Respondent. The notice contained all the elements required in the Appeals Policy, except for the payment of the filing fee ($100.00). The appeal notice stated, "[…] we will be submitting full appeals for both matters shortly, accompanied by the filing fee".

18. Section 3 of the Respondent's Appeals Policy states:

3. Members who wish to appeal a decision shall have ten (10) days from the date on which they received notice of the decision, to deliver a written Notice of Appeal to the CEO.

[Emphasis added]

19. By filing his Notice of Appeal on November 27, 2019, the Claimant did not respect the 10-day deadline, which expired on November 19, 2019.

20. In order for an appeal to be considered outside the 10-day period, the Claimant was required to file a request in which he would have explained the reasons why he could not file within this period. The decision to allow the appeal would then become a matter of discretion: "*The decision to allow, or not allow an appeal outside the 10-day period shall be at the sole discretion of the CEO"* (Section 6 of the Appeals Policy).

21. On December 2, 2019, the Respondent acknowledged receipt of the Claimant's Notice of Appeal but informed him that the Appeal procedures were not triggered, since the filing fee had not been paid. On December 4, 2019, the Claimant filed supplementary submissions where he provided reasons for an exemption to allow his appeal outside the 10-day period.

22. Other communications were exchanged between the Parties over the following weeks, and the filing fee was paid on December 19, 2019.

23. On January 9, 2020, the Respondent rendered a decision whereby it refused to hear the Claimant's appeals. On the November 9 appeal, it considered that the appeal was time-barred. On the November 17 appeal, it considered that the appeal was invalid, since the $100.00 filing fee had not been paid in conjunction with the appeal.

24. The Respondent nevertheless considered the exercise of its discretion under Section 6 of the Appeals Policy, but concluded that there was no valid justification to accept the appeals.

25. I am satisfied that the Respondent's decision not to hear the November 9, 2019 appeal was justified. It was time-barred, and I find no reason to review the exercise of discretion, as per Section 6 of the Appeals Policy, which seems to have been properly exercised.

II. APPEAL OF THE CARDING DECISION (the November 17, 2019 decision)

26. The question is to determine whether the appeal on this decision was receivable under the Appeals Policy.

27. On November 17, 2019, the Claimant was informed by the Respondent that he was not eligible to receive Back Pay for carding.

28. The Claimant filed a Notice of Appeal of this decision on November 27, 2019. The $ 100.00 filing fee was not paid at the same time, since the appeal was filed by email. As stated earlier, the Claimant's representative wrote, "[…] we will be submitting full appeals for both matters shortly, accompanied by the filing fee".

29. Five (5) days later, on December 2, 2019, the Respondent acknowledged receipt of the Claimant's Notice of Appeal but informed him that the Appeal procedures were not triggered, since the filing fee had not been paid. There were no alternative solutions nor invitations to pay that were offered to the Claimant.

30. On December 4, 2019, the Claimant filed additional observations and requested an extension of the 10-day period. On December 6, 2019, the Respondent acknowledged receipt of the Claimant's email. However, it reiterated that the appeal had not been triggered, and therefore would not proceed.

31. Article 4 of the Appeals Policy lists the required elements for an appeal to be deemed receivable, which includes the payment of the filing fee.

32. However, I find that the rule regarding the payment of the fee, with respect to electronic filings, is too vague, if the Respondent wishes to refuse the admissibility of an appeal only for the reason of non-payment. In the case of an appeal that is filed electronically, as in this

situation, the rules simply state that the electronic notification "must be followed with payment". There is no mention of the process for payment, whether by wire transfer or through a hyperlink to pay online, for example. There is also no mention of a delay by which payment shall follow, despite the fact that the Claimant's representative informed the Respondent that "payment would follow".

33. While the Respondent is correct in its requirement that the strict procedure be followed to "trigger" the appeal, it cannot simply sit back and passively wait for the payment to happen, absent instructions spelled out in the procedure or on its website.

34. If payment instructions are absent, then a prompt acknowledgment of receipt of the appeal along with payment instructions and a deadline would have been in line with principles of fairness.

35. The payment policy to trigger the electronic notification of the appeal is vague, and the *contra proferentem* principle compels me to conclude that the appeal should not have been dismissed for this reason, without prior warning. Payment instructions should have been shared, and I do not accept the Claimant's payment history as proper justification for silence by the Respondent. The Respondent's payment procedures may change over time, and the Claimant's history for such payments, or his presumed knowledge or recollection of the process, cannot be held against him.

36. The Claimant later requested payment instructions, but since the decision had already been rendered on December 2, 2019, the requests became meaningless. Nevertheless, he completed payment in person, on December 19, 2019.

37. The December 2, 2019 decision to not open an internal appeal process, as it concerns the November 17, 2019 appeal, is a decision subject to review by the SDRCC, and I find that it was taken inappropriately. Therefore, the decision not to allow the appeal is quashed and I refer this appeal back to BCS for proper disposition under its internal appeal process.

For these reasons, the Claimant's appeal is partially dismissed.

a) I find that the November 9, 2019, appeal is time-barred. The first expression of interest to appeal this decision was formulated on November 27, 2019, well beyond the 10-day delay. BCS considered the discretionary extension of the deadline, and denied the request. I find no reason to vary its decision.

b) I find that the November 17, 2019 internal appeal should have been initiated. Payment instructions/timelines for electronic filings in the Appeals Policy are vague, and must be interpreted against the drafter of the policy where unreasonable in its application. Order is made for BCS to recognize the admissibility of the appeal, and begin the internal appeal process in accordance with its rules of procedure.

I retain jurisdiction and reserve the right to hear any dispute relating to the interpretation or application of the present decision.

Signed in Montreal, on February 8, 2020

Patrice Brunet, arbitrator