

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÉGLEMENT DES DIFFÉRENDS SPORTIF DU CANADA (CRDSC)

February 12, 2021

No: SDRCC 21-0484

BENJAMIN THOMSEN
(Claimant)

AND

ALPINE CANADA ALPIN
(Respondent)

Before: J.J. McIntyre (Sole Arbitrator)

Representatives for the Claimant: Benjamin Thomsen
Shelley Thomsen

Representative for the Respondent: Phil McNichol

REASONS FOR DECISION

1. This is a team selection dispute. The Claimant is an athlete in the alpine disciplines of Super G and Downhill skiing. He is contesting the failure of the Respondent, the National Sports Organization for those events, to exercise its discretion on the basis of injury to include the Claimant in its team selection for the 2021 FIS Alpine World Championship scheduled to take place in Cortina, Italy in February, 2021 (the “World Championship”).
2. The matter came on for hearing on January 30, 2021. Due to the urgency of the matter, and the necessity for the Respondent to finalize the team selection for the World Championship, a decision was required to be rendered by the arbitrator by 11:59 pm MST January 30, 2021.
3. Acting under those strict time constraints, pursuant to the new Canadian Sport Dispute Resolution Code, which came into effect on January 1, 2021 (the “SDRCC Code”) a decision was rendered by me on January 30, 2021 dismissing the Claimant’s appeal with full reasons to follow. These are those reasons.
4. Both the Claimant and the Respondent filed documents in support of their positions and provided testimony in the hearing. The Claimant testified on his own behalf. Phil McNichol, the Respondent’s High Performance Director (“HPD”), testified on behalf of the Respondent.

5. The 2021 FIS ALPINE WORLD SKI CHAMPIONSHIPS - TEAM SELECTION CRITERIA were posted on the Respondent's website by sometime in November 2020 and communicated to the athletes in the relevant sports events (the "Criteria"). The Respondent thought they were published in October, 2020. The Claimant believed it was November. Regardless, the evidence is that the Claimant was aware of the Criteria in November 2020 as a result of their publication.
6. The Criteria specify the process as to how the Respondent would nominate athletes as members of the team for the World Championship. The following paragraphs are relevant provisions to the determination of the Claimant's appeal.

2021 FIS ALPINE WORLD SKI CHAMPIONSHIPS - TEAM SELECTION CRITERIA

1. INTRODUCTION

[...]

- 1.2. The selection criteria shall be interpreted and applied in accordance with the principles of procedural fairness and natural justice.

2. OBJECTIVES

- 2.1. The Canadian objectives at the 2021 FIS Alpine World Championships in Cortina, Italy are:
 - i. To achieve podium success for Canada; and
 - ii. To provide experience and international exposure to Canadian athletes identified as potential future medalists at the elite level.

3. DEFINITIONS

- 3.1. "ACA" means Alpine Canada Alpin;

[...]

- 3.3. "CAST" means the Canadian Alpine Ski Team;

- 3.4. "CAST Alpine Staff" means any one of the following: Alpine, Athletic Director, the discipline Head Coaches or any other coach that is designated as a CAST coach, from time to time by ACA;

[...]

5.0 ELEGIBILITY

- 5.1. In order to be eligible for selection to the team, an athlete must:
[...]

- III. meet the minimum selection criteria under Section 6.0 during Qualifying Period 1 from October 17, 2020 to January 26, 2021 or Qualifying Period 2 from January 27, 2021 to January 31, 2021;

[...]

6. CRITERIA

Athletes shall be considered for selection on the following basis:

6.1 Objective Criteria

- 6.1.1 An athlete will be considered for selection if the following performance criteria is achieved during Qualifying Period 1 and will be ranked in priority as outlined below:

- I. 1x Top 3 World Cup result in the 2020-21 season [...], or
- II. 1x Top 7 World Cup result in the 2020-21 season [...], or
- III. 1x Top 20 World Cup result in the 2020-21 season [...], or
- IV. For Athletes born 1997 and younger, 1x Top 30 World Cup result in the 2020-21 season [...], or
- V. For Athletes born 1997 and younger, Top 45 WCSL in one event on the time of selection.

[...]

6.2 Injury Discretion

- 6.2.1 Should one or more unused quota spots still be available after all athletes are ranked per 6.1.1 after Qualifying Period 1, the CAST Alpine Staff may consider Athletes under injury discretion. Athletes who have lost a full WC competition season or more due to injury are eligible for injury discretion. Eligible athletes would have to meet and be ranked per 6.1.1 after Qualifying Period 1 from WC results during their last season prior to injury. In addition, current WC results should warrant the use of injury discretion and this justification is required for all injury discretion selections. Injury discretion is not automatic and would require an athlete showing a high level of potential through past WC results. Injury discretion is used at the sole discretion of the CAST Alpine Staff and the final decision to select an athlete under injury discretion would be made by the Alpine, Athletic Director.

- 6.2.2 All injury discretionary selections will be documented and will be available for record keeping purposes.

[...]

7 SELECTION PROCESS

- 7.1 The CAST Alpine Staff shall conduct the WSC Selection meeting on January 26, 2021 [...] immediately following the conclusion of the last World Cup competition of Qualifying Period 1.

- 7.2 Selections will be forwarded to the ACA President & CEO for final review.

- 7.3 The Alpine, Athletic Director immediately following final approval, [will] notify [...] those athletes that were eligible for selection, whether or not those athletes were selected.

[...]

10 APPEALS

- 10.1 Any dispute in relation to the selection procedures for the 2021 World Championships must be brought directly to the SDRCC to be heard pursuant to the Canadian Sport Dispute Resolution Code.
- 10.2 An Athlete who wishes to appeal the team selections shall, within 48 hours, commencing from the time of notification after Qualifying Period 1, file an appeal with the SDRCC. A decision must be reached no later than 11:59pm MST on January 30, 2021.
7. The Respondent selected the team for the World Championship on January 26 and the HPD advised the athletes, including the Claimant, as to the team selection on January 27, 2021. The Claimant filed his appeal to the SDRCC on January 28, 2021.
8. The Claimant is a 33-year-old athlete, born in 1987, and is a former member of CAST not currently on the team. He had surgery on his right knee a number of years ago which resulted in him missing an entire year of skiing. He has a long standing injury to his left patellar tendon for which surgery is also recommended but has put off such treatment as he did not want to lose another year of skiing. Further due to COVID-19 surgery was not available to him as an option in 2020.
9. Despite his injury, the Claimant has been competing in World Cup events in 2020 - 2021, not as part of CAST but as a self-funded athlete. Through his own resources, the Claimant has been working with physiotherapists and others to strengthen his knee. He feels that his results are trending in the right direction and his performances are improving.
10. The Claimant provided his race results for the 2020 - 2021 World Cup events in Qualifying Period 1 that he competed in:
- | | | |
|-------------------|---------------------|-------------------------------|
| December 13, 2020 | Val d'Isere, France | 47 th in Downhill; |
| December 19, 2020 | Val Gardena, Italy | 37 th in Downhill; |
| December 29, 2020 | Bormio, Italy | 43 rd in Super G; |
| December 30, 2020 | Bormio, Italy | 37 th in Downhill; |
| January 22, 2021 | Kitzbuehel, Austria | DNS in Downhill; |
| January 24, 2021 | Kitzbuehel, Austria | 34 th in Downhill. |
11. The Claimant did not meet any of the objective criteria for inclusion in the team based on World Cup performances through the 2020 - 2021 season. As there were unfilled quota spots available, the Claimant hoped for team selection based on the exercise of the Injury Discretion set out in section 6.2 of the Criteria.

12. Team selection disputes account for the majority of the disputes that come before the SDRCC. So much so, that the SDRCC has devoted web pages to discussing the issue and published a brochure entitled *Selection Criteria for Major Events in Sport: Guidelines and Tips* for policy makers to design team selection criteria to reduce the risk of disputes.

13. Team selection disputes are governed by Section 6.10 of the SDRCC Code which sets out the onus of proof in these disputes as follows:

If an athlete is a Claimant in a team selection or carding dispute, the onus will be on the Respondent to demonstrate that the criteria were appropriately established and that the disputed decision was made in accordance with such criteria. Once that has been established, the onus shall be on the Claimant to demonstrate that the Claimant should have been selected or nominated to carding in accordance with the approved criteria. Each onus shall be determined on a balance of probabilities.

14. Consequently, although the Claimant is not challenging the adoption of the Criteria, the onus remains on the Respondent to establish that the disputed decision not to select the Claimant under the Injury Discretion criteria (6.2) was made in accordance with section 6.2.1 of the Criteria.

15. The HPD testified that the Criteria were adopted by the Respondent in October, 2020. The Injury Discretion (6.2) is new to the selection process used by the Respondent for the World Ski Championships. Previous team selection criteria for world championships allowed for a broader discretion for inclusion of athletes into teams. In an effort to constrain that broad discretion, the Injury Discretion was defined. It was intended to be used for those athletes that have, due to injury, not been able to compete at all during one or more World Cup competition seasons. No application by an athlete is necessary for them to be considered for the Injury Discretion as the coaches and HPD know which athletes have been injured and unable to compete. The Alpine, Athletic Director referred to in the Criteria is the HPD. These terms are interchangeable.

16. The HPD further testified that as the Claimant has been competing in World Cup events in 2020 - 2021 despite any injury he may be competing with, he was not eligible to be considered for the Injury Discretion selection criteria.

17. The Injury Discretion was in fact used to include at least one athlete in team selection for the World Championship. That athlete was injured for most of the year and was able to compete only recently in a single event placing just outside the results needed for inclusion based on the objective criteria for World Cup performances.

18. While the HPD has the final decision as to whether to select an eligible athlete under the injury discretion provision, that recommendation for inclusion into the World Championship team still has to be approved by the ACA President and CEO.

19. In *Richer v. The Canadian Cerebral Palsy Sports Association (including Boccia Canada)*, SDRCC 15-0265, Arbitrator Pound made the following comments regarding selection criteria (at page 11):

Selection criteria need to contain some reasonable flexibility, but at the same time, cannot be entirely arbitrary. Certain sports lend themselves to somewhat easier team selection choice, where objective criteria such as times, point scores, weights and distances can be used. Others can be more or less self-selections, such as eligibility based on the results of qualification tournaments. The more difficult choices occur when there may be some element of judgment required regarding performance standards or a need to produce a team that will function most effectively in competition. The default position in such cases, absent reviewable error or proof of bias, is that those responsible for selection decisions are generally the most knowledgeable and experienced persons available, who attempt in good faith to produce the best possible outcomes in the particular circumstances.

20. Section 6.11(c) of the SDRCC Code tempers the above comments as that section provides that “No deference need be given by the Panel to any discretion exercised by the Person whose decision is being appealed, unless the Person can demonstrate relevant expertise”.
21. In *Prediger v. Bobsleigh Canada Skeleton* SDRCC 15-0284/5 at para. 132 Arbitrator Brunet stated that selection standards are reviewable only if they are patently unfair, arbitrary or discriminatory. There is nothing patently unfair, arbitrary or discriminatory about the Criteria in this case. To the contrary, based on the evidence, the Respondent adopted a standard for use of injury discretion in team selection that removed arbitrariness from the process previously used. Injury discretion, to be available for use, had to fall within the parameters of s. 6.2.1 of the Criteria. I was satisfied that the Respondent had met its onus in a team selection dispute to demonstrate that the selection criteria were appropriately established and that the disputed decision was made in accordance with the criteria.
22. Consequently, the onus shifted to the Claimant to demonstrate that he should have been selected in accordance with the applicable approved criteria for Injury Discretion.
23. The Claimant’s position was that since he had an undisputed injury, the HPD should have exercised the Injury Discretion and selected him for the World Championship. That position might have succeeded prior to the adoption of the limitations on use of Injury Discretion (6.2) in team selections. It is contrary to the limitation on the use of the Injury Discretion in s. 6.2.1 that it is to be used only for athletes who, due to injury, have lost a World Cup competition season.

24. The Claimant filed with his appeal his results for the 2018 - 2019, 2019 - 2020 and 2020 - 2021 World Cup seasons. The Claimant substantially competed in all three seasons.
25. The Claimant was aware of the Criteria before competing in any World Cup events in his disciplines in 2020. He either was aware or he should have been aware at that time that there was a limited scope for use of the Injury Discretion set out in the Criteria. If there was any doubt in his mind as to how the Injury Discretion might be interpreted, it was incumbent on the Claimant to make inquiries. There is no evidence that he did so or was misled by the plain and ordinary meaning of s. 6.2.1.
26. It is unfortunate that the Claimant by competing in World Cup events during Qualifying Period 1, may have taken himself out of eligibility for the use of the Injury Discretion set out in the Criteria. However, even if the Claimant was eligible, given the Objectives set out in the Criteria, whether the Injury Discretion would have been exercised in the Claimant's favour had he not competed during Qualifying Period 1 is questionable.
27. The HPD did have a discretion which eligible athletes to use the Injury Discretion for and nominate for the team. As he testified, the coaches and the HPD in particular know which athletes have been unable to compete due to injury. They have the relevant expertise and are the most knowledgeable and experienced persons to make team selections based on exercise of the Injury Discretion, given the Objectives set out in the Criteria.
28. The Claimant failed to meet his onus to demonstrate that he was eligible for the use of the Injury Discretion and that it ought to have been used in his case. He failed at the first hurdle. The HPD did not in fact have the discretion to include the Claimant in the team selection for the World Championship based on Injury Discretion as the Claimant was not eligible for such consideration. In the circumstances, the appeal by the Claimant was dismissed.
29. Neither party addressed the issue of costs during the hearing.
30. This was an appeal as of right direct to the SDRCC as per section 10 of the Criteria.
31. Costs in this dispute are dealt with by two Sections of the SDRCC Code. The Arbitration General Rules specify in Section 5.14(a) the general principle that "*...each Party shall be responsible for its own expenses and those of its witnesses.*" Under Article 6, the Specific Arbitration Rules for the Ordinary Tribunal, Section 6.13 for Costs states in subsection (a):

(a) The Panel shall determine whether there is to be any award of costs, including but not limited to legal fees, expert fees and reasonable disbursements, and the amount of any such award. In

making its determination, the Panel shall consider the outcome of the proceeding, the conduct of the Parties and abuse of process, their respective financial resources, settlement offers and each Party's good faith efforts 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.

32. There is no reason in this case to depart from the general principle. There are no circumstances which would justify making an award of costs in favour of either the Claimant or the Respondent. Each party shall bear their own costs.

Dated this 12th day of February, 2021.



JJ McIntyre