

SPORTS DISPUTE RESOLUTION CENTRE OF CANADA (“SDRCC”)

SDRCC FILE NO. 19-0421

**KAILLIE HUMPHRIES**

Claimant

and

**BOBSLEIGH CANADA SKELETON**

Respondent

and

**TODD HAYS**

Affected Party

**COSTS AWARD**

**Arbitrator: The Honourable Robert P. Armstrong, Q.C.**

**Counsel:**

Jeffery R.W. Rath and Katherine Newton

Counsel for the Claimant, Kaillie Humphries

Arif Chowdhury and Vhair Storwick

Counsel for the Respondent, Bobsleigh Canada Skeleton

## **I. INTRODUCTION**

1. In my Award of July 15, 2021 I set aside certain findings in the Report delivered by Dylan Hill in respect of a complaint of Kallie Humphries regarding alleged breaches of sections 10(a) and 14(b) of the Discrimination and Harassment Policy (“DH Policy”) of Bobsleigh Canada Skeleton (“BCS”) and dismissed the complaint pursuant to section 10(g) of the DH Policy. In the result I ordered that there should be a new investigation in respect of the complaint pursuant to sections 10(a) and 14(b) of the DH Policy.
2. Counsel for Ms. Humphries now seek costs on a solicitor-client basis against BCS and Mr. Hays. Counsel for BCS submit that there should be no award of costs to any of the parties. Counsel for Mr. Hays made no submissions other than to advise that Mr. Hays adopts the position taken by BCS.

## **II. THE POSITION OF KALLIE HUMPHRIES**

3. Counsel for Ms. Humphries submit that since this proceeding was governed by the SDRCC Code dated January 1, 2015 that it is the Code, which governs the issue of costs in this case.
4. Under section 6.22(a) of the 2015 Code the general rule is that the parties to an arbitration are responsible for their own expenses. However, under 6.22(c) an arbitrator has jurisdiction to make an award of costs. If such an award is to be

made the arbitrator “shall take into account the outcome of the proceedings, the conduct of the parties and the respective financial resources, intent, settlement offers and each party’s willingness in attempting to resolve the dispute prior to or during arbitration.”

5. Previous cases have made it clear that it is only where there are exceptional circumstances that an arbitrator shall depart from the general rule that each side pays its own costs. See for example, *Pyke v. Taekwondo Canada, et al*, SDRCC 15-02073.
6. Counsel for Ms. Humphries submit that this case is exceptional, and they identified a number of factors, which they argue places it in the exceptional category as discussed in the following paragraphs.

**(i) Ms. Humphries was the successful party**

7. While Ms. Humphries did not enjoy complete success, her counsel submit that the overall outcome of the proceedings was in her favour.

**(ii) The conduct of the parties**

8. Counsel for Ms. Humphries allege that Mr. Hays and his counsel breached the confidentiality provisions of the SDRCC Code. Counsel submit that Mr. Hays filed a Statement of Claim and an Amended Statement of Claim in the Court of Queen's Bench of Alberta alleging that Ms. Humphries made defamatory statements in certain emails which had been filed in support of her complaint and are subject to the confidentiality provisions of the SDRCC Code. The particular emails are said to have triggered the application of the DH Policy and were the subject of the Hill Investigation.
9. Counsel for Ms. Humphries also allege that "Throughout the arbitration BCS continued to deny any wrong doing with respect to the unreasonable and unfair Hill Investigation and the Decision and fully supported Mr. Hays in his position, despite Mr. Hays' breach of the SDRCC Code, his agreement with BCS and the DH Policy."

**(iii) Ms. Humphries made reasonable settlement offers**

10. Counsel for Ms. Humphries assert that Ms. Humphries made more than one settlement offer which was reasonable and ought to have been accepted by Mr. Hays.

**(iv) The financial resources of Ms. Humphries**

11. Counsel for Ms. Humphries assert that there was a disparity in the financial resources between Ms. Humphries, BCS and Mr. Hays, which should weigh in Ms. Humphries' favour. She described herself as an athlete with "limited financial resources".

**(v) BCS and Mr. Hays – Intent**

12. Ms. Humphries submits that her intention with respect to this arbitration was to receive a new independent investigation into her complaints so that she might receive procedural fairness. She claimed that she was seeking personal vindication and that she was pursuing this arbitration as a matter of public

interest in order “to work towards more transparent and independent safe sport mechanisms in Canada so that athletes feel safe coming forward with complaints...and are not deterred by Ms. Humphries’ experience.” Counsel for Ms. Humphries state that in contrast, the intent of BCS and Mr. Hays in this arbitration was to vindicate themselves and to oppose Ms. Humphries request for a release from BCS to compete for the United States Bobsleigh and Skeleton Federation.

### **III. MS. HUMPHRIES’ CLAIM FOR COSTS**

13. Ms. Humphries’ claim for a Costs Award on a solicitor-client basis is \$92,401.20.

### **IV. THE POSITION OF BCS**

14. Counsel for BCS submit that the relevant Code for determining costs is the SDRCC Code that came into effect on January 1, 2021. They argue that the new costs provisions are procedural and therefore come into effect immediately. See, *R v. Dineley*, [2012] 3 SCR 272 at pp. 280-281.

15. The substantive difference between the 2015 Code and the new Code is the removal of the “intent” factor in deciding whether to depart from the general

rule that parties bear their own costs. Counsel submits that section 5.14(a) of the new Code, as well as the SDRCC case law, is to the effect that each party shall be responsible for its own costs. They note that section 6.13 of the new Code further confirms that costs do not necessarily follow the event. As under the 2015 Code a party seeking costs must show exceptional circumstances to depart from the general rule.

16. Counsel for BCS further submit that BCS did not utterly fail to investigate the complaints in issue and was not entirely responsible for the inadequacies of the investigation.

17. As in the case of Ms. Humphries, counsel for BCS reviewed the various factors that should be considered in concluding whether “exceptional circumstances” exist, which support a conclusion that costs should be awarded to Ms. Humphries. These are considered below in the following paragraphs.

**(i) Outcome of the proceeding**

18. Counsel for BCS submit that the results were mixed and that Ms. Humphries only achieved partial success.

19. Counsel argue that success in respect of the preliminary issues was divided in this arbitration. Counsel submit that BCS was successful in its jurisdictional application and BCS did not resist any other preliminary applications made by Ms. Humphries.

20. Counsel for BCS cite *Meisner et al. v. Equine Canada*, SDRCC 08-0070 where Arbitrator Pound described the claimant's case in Meisner as "somewhat unfocused" at the outset. This resulted in significant costs having been incurred at the outset. He declined to make a costs award.

## **(ii) Conduct of the parties**

21. Counsel for BCS submit that there was no conduct of BCS in this arbitration that could be described as reaching the level of exceptional circumstances.

Counsel for BCS submit that counsel for Ms. Humphries attributes the alleged conduct of Mr. Hays to BCS when there is no basis to do so.

22. In respect of Ms. Humphries' claim that Mr. Hays breached his confidentiality obligations by referring to certain emails in this proceeding in support of his defamation case it is noted that the emails in questions were also sent by Ms.

Humphries to a number of people who were neither BCS members nor affiliated with BCS.

23. Counsel for BCS also submit that “waiver may be obtained from the implied undertaking rule, which is analogous to the confidentiality provisions in section 5.9 of the present Code. They cite *Ochitwa v. Bombino*, 1997 Can LII 14899 (AB QB) where the Court waived the implied undertaking rule in a defamation case, which was based on evidence given on examination for discovery in a different proceeding. In that case the Court said at page 9:

The public interest favours disclosure as the Defendants, if they have defamed the Plaintiff should not be permitted to hide their defamation behind the protection of the implied undertaking rule. A rule set up to protect the administration of justice should not be permitted to be used to subvert the ends of justice and prevent those defamed from seeking justice.

24. Counsel for Ms. Humphries allege that the conduct of BCS has deterred others from making complaints of harassment and abuse. Counsel for BCS take issue with this allegation. BCS notes that it streamlined the process by agreeing to proceed directly to the SDRCC proceeding rather than to proceed through the BCS discipline process. BCS also noted that they provided a copy of the transcript of the proceedings in this arbitration at no cost to Ms. Humphries.

25. Counsel for BCS argue that, in fact, Ms. Humphries’ conduct should be called into question. Following the release of the Award in this case Ms. Humphries

made a number of comments to the press before there had been any official release of the Award. Ms. Humphries made a number of statements of a serious nature in respect of her former coach, Todd Hays. Counsel for BCS also refers to a number of other public statements made by Ms. Humphries, which they say are in breach of her obligation of confidentiality.

### **(iii) The financial resources of the parties**

26. Counsel for BCS submit that there has been no financial burden to Ms.

Humphries presenting her case. Both her former counsel and present counsel have acted on a pro bono basis.

### **(iv) Intent**

27. As indicated above the position of BCS is that the January 2021 Code governs this case, which has removed “intent” as a factor to consider in respect of a possible Costs Award. In any event, counsel submit that there is no evidence of inappropriate intent on the part of BCS and Mr. Hays.

**(v) Settlement offers and willingness to attempt to resolve the case**

28. Counsel for BCS submit that Ms. Humphries achieved only mixed success in this arbitration. They further submit that the proposal of counsel for Ms. Humphries to set aside the Hill Investigation but not to reinvestigate the complaints is not a reasonable offer that BCS could accept. Under that proposal the complaints would remain outstanding against Mr. Hays and others, which should be either determined or withdrawn. A settlement which, failed to determine or withdraw the complaints is simply not acceptable and should be disregarded. The proposed settlement of Ms. Humphries, in the absence of a withdrawal of the complaints would have left the respondent, Mr. Hays and others to the complaints in a state of limbo with serious allegations against them remaining unresolved. Such a result would be unfair to the respondent, Mr. Hays and others and would be clearly unacceptable to the sporting community.

29. Counsel for BCS made the following submission on this issue:

Additionally, the claimant did not offer to withdraw the complaints. A discontinuance without a withdrawal of her allegations would leave BCS in a precarious position. Complaints against Mr. Hays, Ms. Storey and Mr. LeBihan, would remain outstanding and cast doubt on BCS's credibility as an organization. BCS has an obligation to all parties and a broader obligation to its membership. Any settlement offer or proposal from the claimant that did not involve a determination or withdrawal of her very serious allegations cannot be

considered a genuine attempt to settle the dispute. Accordingly, it was reasonable of BCS not to accept it.

## V. CONCLUSION

30. I am not persuaded that there is any valid reason to depart from the general rule that each party shall be responsible for its own costs. I do not accept the position advanced by counsel for Ms. Humphries.

31. I set aside the investigation in this case because the investigator made certain fundamental errors in his investigation, which were not attributable to anything that any of the parties had done or failed to do. I conclude that BCS, in good faith, appointed an investigator who they believed was qualified to do the job. They had hoped to have an SDRCC investigator take on the responsibility of the investigation but apparently that was not an available option.

32. I do not agree that the factors relied upon by counsel for Ms. Humphries establish that there were exceptional circumstances at play, which could lead me to depart from the general rule.

33. Success in this case was mixed and at the end of the day no one was a winner as there is still another investigation to take place. I do not agree that counsel for BCS and Mr. Hays and their clients acted in any way that calls for a sanction by

way of a costs order. In my view they acted with complete integrity through the course of this arbitration.

34. Counsel for Ms. Humphries succeeded in setting aside the investigation report.

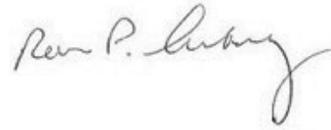
However, that fact alone does not establish exceptional circumstances and is not a justification for an award of costs in this case.

35. In respect of the rejection of Ms. Humphries' offers to settle I accept the position of BCS. A settlement that did not resolve the outstanding complaints was simply not a settlement that BCS, Mr. Hays and others at BCS could reasonably accept.

36. In respect of the lack of financial resources of Ms. Humphries I was not provided with any information concerning her personal financial position. That said, accepting that she does not have sufficient funds to pay for the legal fees, she is in the same position as most struggling athletes. For that reason, lawyers are prepared, as a matter of professional obligation, to act on a pro bono basis. That is what happened here.

37. In the result, the request for a Costs Award in favour of Ms. Humphries is dismissed.

Dated at Toronto, this 29th day of September, 2021

A handwritten signature in cursive script, appearing to read "Rev. P. Armstrong".

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The Honourable Robert P. Armstrong, Q.C.