

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

No: SDRCC 23-0631

**LUJAYN ABDELFAH
(CLAIMANT)**

AND

**WATER POLO CANADA
(RESPONDENT)**

Before

**Aaron Ogletree
(Arbitrator)**

ARBITRATION AWARD

Appearances and Attendances:

On behalf of the Claimant: Alisa Lombard (counsel)
Doaa Abdelfattah

On behalf of the Respondent: Chris Burkett (counsel)

Observers: Dana Hirsh (SDRCC Women in Arbitration
Mentorship Program)
Kim Bodnarchuk (SDRCC Women in Arbitration
Mentorship Program)

PROCEDURAL HISTORY

1. This Request for Arbitration was made by Ms. Lujayn Abdelfattah (hereinafter the “Claimant”), a minor, pursuant to the Canadian Sport Dispute Resolution Code (hereinafter the “Code”) appealing the decision of Water Polo Canada (hereinafter the “Respondent”) that provisionally suspended (hereinafter the “suspension”) the Claimant which barred her temporarily from participating in any Respondent sanctioned events effective March 18, 2023.
2. Following the National Championship League (hereinafter the NCL) Eastern Division 17U tournament in Markham in early February, the Respondent’s Independent Safe Sport Officer and Case Manager, Ms. Lise Maclean, (hereinafter the “ISSO”) received a “new” complaint against the Claimant alleging inappropriate contact between the Claimant and an athlete from another team (hereinafter the “Complainant”). The ISSO appointed a panel regarding the allegation.
3. Early the week of March 18, 2023, the panel advised the Respondent that the process regarding the allegation against the Claimant is ongoing and would not be completed before the end of March.
4. On March 18, 2023, the Respondent issued a provisional suspension against the Claimant.
5. On March 20, 2023, the Claimant appealed the Respondent’s provisional suspension decision pursuant to the Respondent’s Appeal Policy Subsection 8.1(c), (d) and (e). The Claimant appealed on the grounds that: 1) the provisional suspension decision is wrong and 2) the provisional suspension is unfair and biased.
6. On March 29, 2023, the Claimant, in her Request for Arbitration with the SDRCC, seeking the immediate lifting of her suspension and to have the rescission in writing stated that:

The Provisional Suspension Decision states that Lise Maclean (WPC safe sports office) received a new complaint against Ms. Abdelfattah, consisting of alleged inappropriate contact between her and an athlete from another team. The letter does not state if this “new” complaint relates to the current ongoing complaint before adjudicator J. Raphael, the process was initiated by Ms. Abdelfattah as against a player [*sic*] from another club for physical assault, in the first instance. The York Police determined the physical assault allegation to be founded, and the sexual assault allegation against Ms. Abdelfattah to be unfounded. We surmise that the “alleged inappropriate contact” refers to the latter.

The Provisional Suspension Decision says that Ms. Abdelfattah “has been provided with the opportunity to fully respond to these allegations” pursuant to the WPC code of Conduct and Disciplinary Process. This is not correct and at odds with the notice’s third paragraph where it says “... in light of the ongoing review of the complaint...” The claimant says, and the fact is,

that she has not responded to the allegations as the process has not reached that milestone. This information is objectively available to the decision-maker in an exercise of due-diligence. The complaints were originally scheduled to be heard on March 20, 2023. Evidentiary challenges beyond my client's control presented. I am informed that these challenges are exacerbated by Ms. Abdelfattah's unfair unilateral provisional suspension at a critical time in the season. A new hearing date, has been set for April 11, 2023. In all respects of the Provisional Suspension Decision's appeal, the balance of convenience favours the claimant.

The Provisional Suspension Decision is Unfair and Biased since the Water Polo Canada's notice is internally inconsistent, grounded in inaccurate procedural considerations, gives rise to serious partiality concerns, and troublingly appears coercive [*sic*] and retributive in the specific circumstances. To the best of the claimant's knowledge, the athlete from the other club is not provisionally suspended, despite impending criminal charges and her involvement in this ongoing complaint as well.

7. On March 30, 2023, the Claimant wrote a letter to the Respondent seeking its agreement to have her provisional suspension determined through the SDRCC's process on an emergency basis by arbitration.
8. On March 31, 2023, the Respondent filed its Answer to the Claimant's Request seeking to maintain the Claimant's provisional suspension in place until a final determination is made regarding the allegations against the Claimant. The Respondent answered the Claimant's Request arguing that: 1) the provisional suspension is reasonable in the circumstances and 2) the appellant has been provided with the opportunity to fully respond to these allegations.
9. On March 31, 2023, the SDRCC appointed me from its rotating list of arbitrators to make a determination on the Claimant's appeal.
10. On March 31, 2023, an arbitration hearing was conducted by videoconference.

Relevant Provisions

11. Section 6.11 of the Code provides, in part, as follows:
 - The Panel, once appointed, shall have full power to review the facts and apply the law. In particular, the Panel may substitute its decision for the decision that gave rise to the dispute or may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.
12. Section 6 of the Respondent's Code of Conduct with Disciplinary Procedure (hereinafter the "CCDP") governs the application of the Code of Conduct. The section states that:
 - The Code of Conduct applies to Individuals' conduct during WPC business, activities, and events including, but not limited to, competitions, tournaments, games, matches, practices, tryouts, training camps, and travel associated with WPC.

13. Section 27 of the Respondent's CCDP governs the application of the Disciplinary Procedure. The section states that:

- The Disciplinary Procedure applies to the conduct of Individuals during WPC business, activities, and events including, but not limited to, competitions, tournaments, games, matches, practices, tryouts, training camps, and travel associated with WPC. As described in the UCCMS, Maltreatment is also forbidden outside of the sport environment where the Maltreatment has a serious and detrimental impact on another Individual.

14. Section 50 of the Respondent's CCDP governs the Suspension Pending a Hearing.

- WPC may determine that an alleged incident is of such seriousness as to warrant immediate suspension of a Registrant pending a hearing and a decision of the Panel.

15. Section 37 of the Respondent's CCDP governs the Complaint Administration. This section states that:

- Should mediation not resolve the dispute, WPC's Executive Director (or designate) will appoint a Case Manager to oversee management and administration of a complaint submitted in accordance with this Procedure. [...] The Case Manager has an overall responsibility to ensure procedural fairness is respected at all times, and to implement this Procedure in a timely manner. More specifically, the Case Manager has a responsibility to:
 - a) Determine whether the complaint is frivolous or vexatious, and within the jurisdiction of this Procedure. If the Case Manager determines the complaint is frivolous or vexatious or outside the jurisdiction of this Procedure, the complaint will be dismissed immediately. The Case Manager's decision to accept or dismiss the complaint may not be appealed
 - b) Determine if the complaint is a minor or major infraction
[...]
 - g) Provide any other service or support that may be necessary to ensure a fair and timely proceeding

16. Section 14 of the Respondent's CCDP governs the Physical Maltreatment. This section states that:

- Physical Maltreatment includes, without limitation, contact or non-contact behaviours that have the potential to cause physical harm.
 - a) Contact behaviours
Including but not limited to: deliberately punching, kicking, beating, biting, striking, strangling or slapping another; deliberately hitting another with objects.

[...]

17. Section 15 of the Respondent's CCDP governs the Sexual Maltreatment. This section states that:

- Sexual Maltreatment includes, without limitation, any act targeting a person's sexuality, gender identity or expression, that is committed, threatened or attempted against a person, and includes but is not limited to the Criminal Code Offences of sexual assault, sexual exploitation, sexual interference, invitation to sexual touching, indecent exposure, voyeurism and non-consensual distribution of sexual/intimate images. Sexual Maltreatment also includes sexual harassment and

stalking, cyber harassment, and cyber stalking of a sexual nature. Examples of Sexual Maltreatment include, without limitation:

[...]

- b) Any intentional touching of a sexual nature of any part of a person's body, however slight, with any object or body part by a person upon another person, including but not limited to:
 - i. kissing;
 - ii. intentional touching of the breasts, buttocks, groin or genitals, whether clothed or unclothed, or intentionally touching of another with any of these body parts

[...]

ARGUMENTS

Claimant's Position:

18. The Claimant received a letter from the Respondent providing notice of her provisional suspension. The letter states that the ISSO received a "new" complaint against her, consisting of alleged inappropriate contact between her and the Complainant. The letter does not state if this "new" complaint relates to the current ongoing complaint before adjudicator J. Raphael which was initiated by the Claimant against the Complainant for physical assault. The York Police determined that the physical assault allegation to be founded, and the sexual assault allegation against the Claimant to be unfounded. The Claimant assumes that the "alleged inappropriate contact" refers to the latter. The Complainant was not provisionally suspended despite the allegations, the York Police finding against her and impending criminal charges.
19. The provisional suspension decision says that the Claimant "has been provided an opportunity to respond to these allegations" pursuant to the Respondent's Code of Conduct and Disciplinary Process. However, it is not correct and is at odds with notice's third paragraph where in it says "[...] in light of the ongoing review of the complaint [...]" Further, the Claimant has not responded to the allegation because the process has not reached the part where she can respond. In fact, the opportunity for her to respond was delayed from March 20, 2023 to April 11, 2023 when evidentiary challenges beyond the Claimant's control were presented.
20. The provisional suspension of the Claimant is occurring at a critical time in the season when there are important tournaments. This suspension is damaging her dignity and she is losing opportunities to be visible to scouts and pursue university, national team and scholarship opportunities. Further, these missed opportunities will affect her Water Polo path and ranking.
21. The Respondent's provisional suspension decision is unfair and biased since the Claimant's notice is internally inconsistent, grounded in inaccurate

procedural considerations, gives rise to serious partiality concerns, and troublingly appears coercive and retributive.

Respondent's Position:

22. The Respondent received a complaint against the Claimant for the alleged inappropriate touching another athlete's genitals beneath the bathing suit under the water during a match.
23. The Claimant submitted that the Complainant is alleged to have punched the Claimant. The Claimant's allegation against the Complainant is subject to a counter-complaint and will be addressed under the Respondent's Code of Conduct and Disciplinary Process. The Respondent distinguishes its decision to permit the Complainant to continue competing while awaiting a hearing on the basis that the Claimant's alleged conduct can be considered sexual violence.
24. The National Sport Organization community is changing to ensure allegations of misconduct are properly adjudicated and that allegations of non-consensual sexual contact in sport are taken seriously and dealt with in a fair and judicious process.
25. The Respondent deliberated on the issue and determined that a provisional suspension is appropriate given the nature of the offense while the merits of the complaint are adjudicated by an independent panel.
26. The Respondent argues that the complaint against the Claimant is under investigation before a panel put together by the ISSO. A hearing is scheduled on the merits on April 11, 2023 at which time the Claimant will have an opportunity to respond to the allegations against her. In addition, the Claimant has been provided with a forum to challenge these allegations before an independent Panel and the Respondent has at all times acted in a reasonable manner trying to address the impacts of its decisions.
27. The Respondent has taken a firm stance on addressing all allegations of sexual violence in a serious and cautious manner. The provisional suspension against the Claimant is consistent with the goal of ensuring anyone involved in water polo is within a safe, welcoming and inclusive environment.
28. It seeks to maintain the provisional suspension of the Claimant in place until a final determination is made regarding the allegations against her.
29. The Respondent balanced their obligations to ensure the safety of other players with the Claimant's rights as an athlete, it was prudent to follow a zero-tolerance approach pending a final finding regarding these allegations. The Respondent carefully considered the impact on the Claimant with the need to ensure safety of the community when deciding the extent of the suspension and when to impose it.

30. The Respondent's provisional suspension of the Claimant is reasonable because of the allegations and the direction from the highest levels of government and the judiciary regarding sexual violence matters.

SUMMARY OF EVIDENCE

31. The Claimant, a minor and Muslim, is an active practitioner of Water Polo at the 15U and 17U levels.

32. The Respondent is a national sport organization registered in Canada.

33. There is an ongoing complaint before adjudicator J. Raphael which was initiated by the Claimant against the Complainant for physical assault. The York Police determined that the physical assault allegation to be founded, and the sexual assault allegation against the Claimant to be unfounded.

34. Following the NCL Eastern Division 17U tournament in Markham in early February, the ISSO received a new complaint against the Claimant alleging inappropriate contact between the Claimant and an athlete from the Complainant.

35. The Claimant was provisionally suspended by the Respondent until completion of the disciplinary process via letter dated on March 18, 2023.

36. The provisional suspension resulted in the Claimant being removed from the NCL 17U team tournament that took place on March 24-26, 2023 and the 15U team that participated in a March Madness tournament that took place on March 30-April 2, 2023.

37. The panel hearing was delayed from March 20, 2023 to April 11, 2023, so the Claimant could not respond to the allegations.

DECISION

38. The validity of the Claimant's claim that the Arbitrator should substitute his decision for the Respondent's decision depends upon the validity of the Claimant's: A) procedural challenge alleging bias of the Respondent; and B) substantive challenge of whether the Respondent's decision is reasonable.

A. Procedural Challenges to the Respondent's Decision

39. The determination of whether the Arbitrator should substitute his decision for the decision of Respondent depends on the validity of the Claimant's procedural

challenges. The Claimant's procedural challenge is the decision of the Respondent to suspend the Claimant was influenced by bias.

1. Is the Respondent's Decision Influenced by Bias?

40. The Claimant argues that the Respondent's decision is biased since the Respondent's notice is internally inconsistent, grounded in inaccurate procedural considerations, gives rise to serious partiality concerns, and partiality concerns, and troublingly appears coercive and retributive. In fact, the Claimant stated that the Respondent has a toxic culture and retributive culture. Further, she noted that she believes her being a Muslim played a role in how she is treated. She also claimed that the Complainant is not suspended despite the allegations against her, though the York Police determined the allegations against her to be founded. In contrast, the Claimant is suspended due to the allegations against her, even though the York Police determined those allegations to be not founded.
41. It is undisputed that the Claimant is a very talented athlete who is performing beyond her age group. There is no evidence that the Respondent has an interest in suspending the Claimant except for the allegations against her and the current environment of sport and politics is making the Respondent handle allegations of this nature in a serious and cautious manner. Further, the Claimant and the Complainant were treated differently not because of the bias by the Respondent, but because the nature of the allegations against them are different and the difference between the allegations are enumerated in the Respondent's Code of Conduct and Disciplinary Process.
42. It is possible that the Complainant may have sought retribution through its allegations, the Complainant is an athlete with no decision-making authority on behalf of the Respondent. Further, there is no evidence of the Claimant or the Respondent having any relationship to the Respondent except as athletes.
43. It is true that the Respondent was inaccurate in its claim that the Claimant already had the right to respond to the allegations against her when she did not have the opportunity yet. That is not bias, it is just a misstatement and she was not denied the opportunity to respond to the allegations.

B. Substantive Challenges to the Respondent's Decisions

44. The determination of whether the Arbitrator should substitute his decision for the decision of Respondent depends on the validity of the Claimant's substantive challenge. The Claimant's substantive challenges are: i) is the decision of the Respondent unreasonable because the Claimant incorrectly stated that she already had an opportunity to respond to allegations against her; ii) is the Respondent's decision unreasonable because the suspension letter did not state whether it is related to the ongoing complaint which the York Police determined the allegations not to be founded.

1. Standard of Review

45. Arbitrators owe deference to sporting authorities. The standard for whether the Arbitrator should substitute its decision for that of the Respondent's depends on whether the decision is reasonable. This standard of review is supported by *Mehmedovic v. Judo Canada et al.* (SDRCC 12-0191/92) and *Beaulieu v. Gardner et al.* (SDRCC 13-0214). A merely incorrect decision is insufficient for an Arbitrator to substitute its decision for that of the Respondent's decision *Palmer v. Athletics Canada et al* (SDRCC 08-0080) and *Pyke v. Taekwondo Canada* (SDRCC 16-0296). Further, absent an abuse of power, a jurisdictional error, bias or procedural irregularity, a decision maker has the right to be wrong. (SDRCC 16-0296).

2. Is the Respondent's Decision Reasonable?

46. The standard of review to be applied is that of reasonableness. Absent provisions to the contrary, the burden is on the Claimant to demonstrate that the decision is unreasonable. Reasonableness was recently defined by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339: Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190) was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law". (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome. (*Khosa*, at para. 59).

- i) **Is the Respondent's decision unreasonable because the Claimant did not respond to allegations when at the time the Claimant did not have the opportunity to respond?**

47. The Claimant suggests that the Respondent's decision is unreasonable. According to the Claimant, the Respondent is incorrect in its statement that the Claimant had an opportunity to fully respond to the allegations against her, although at the same time the Respondent admitted that there was still an ongoing review of the complaint. Further, the Respondent had not reached the part of the process which allows the Claimant to respond to the allegations. In addition, the Claimant states that evidentiary challenges beyond her control further delayed her opportunity to do so. Moreover, the suspension is occurring at a "critical time in the season" when she has many opportunities to advance herself.

48. The Respondent considered the new complaint against the Claimant and determined that she will be suspended until a hearing on the merits is completed. It is undisputed that section 50 of the Respondent's CCDP permits it to suspend athletes until there is a hearing on the merits completed. It is true that the Respondent incorrectly claimed that the Claimant already had the right to respond to the allegations against her when she did not yet have the opportunity. However, it is undisputed that the Claimant's opportunity to fully respond to the allegations was on April 11, 2023 which is about 2 months after the complaint was received. The Respondent even attempted to provide her earlier date to respond to the allegations which was about a month after the Respondent received the allegations, but it was delayed due to evidentiary challenges. The fact that this suspension is occurring during a critical part of the Respondent's season is clearly damaging and disappointing to the Claimant, but it is not unreasonable decision considering the nature of allegations and the Respondent's objective to appropriately address such allegations and to provide a better sport environment.

ii) Is the decision of the Respondent unreasonable because the Claimant incorrectly stated that she already had an opportunity to respond to allegations against her?

49. The Claimant indicates that the Respondent's suspension decision is unreasonable because this is a "new" complaint of inappropriate contact against the Claimant after the sexual assault allegation complaint against her was determined to be unfounded by the York Police. However, her complaint for physical assault against the Complainant was determined to be founded by the York Police. Further, the Respondent did not state in its suspension decision if this new complaint relates to current ongoing complaint which is already being adjudicated.

50. The Respondent clarified and noted that the complaint against the Claimant is considered a counter-complaint to the Claimant's allegations against the Complainant. The Respondent acknowledged that it is treating the Claimant and Complainant differently because the allegation against the Claimant may be considered sexual violence and the one against the Complainant is considered physical assault due to her punching the Claimant. The Respondent even distinguishes those forms of maltreatment in sections 14 and 15 of the Respondent's CCDP. It is clear that the York Police did its investigation and reached its conclusion regarding the allegations which resulted in a favorable outcome for the Claimant. However, a determination by the York Police does not preclude the Respondent from its own investigation and determination.

AWARD

51. The Arbitrator does not find the Claimant's procedural and substantive claims compelling in order to justify the Arbitrator substituting his decision for the Respondent's decision. Against that background and in the exercise of my discretion, I dismiss the Claimant's claim.

Signed in Detroit, this 17th of April, 2023.



Aaron Ogletree, Arbitrator