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

NO: SDRCC 23-0654
(ORDINARY TRIBUNAL)

ANONYMIZED
(Claimant)

AND

HOCKEY CANADA
(Respondent)

PRELIMINARY DECISION ON THE SCOPE OF THE APPEAL

Matthew Wilson – Sole Arbitrator

Attendees at hearing:

For the Claimant: Christopher Considine (Counsel)

For the Respondent: Nathan Kindrachuk
Adam Klevinas (Counsel)

INTRODUCTION

This is an appeal of a disciplinary penalty imposed by Hockey Canada against the Claimant. As the issue involves minors, the identity of the Claimant and the complainant hockey player (hereinafter referred to as "the Complainant") will be anonymized. In a previous decision, I denied the Claimant's request for interim relief of the disciplinary suspension. The Appeal is scheduled to be heard on August 14, 2023 commencing at 11:30am (EDT).

On July 28, 2023, the parties appeared before me in a Preliminary Meeting to determine the most efficient way to proceed with the Appeal. It quickly became apparent that the parties were in dispute about the scope of the Appeal. There is also a dispute about whether the Complainant should be identified as an Affected Party.

After hearing submissions from the Parties, I advised counsel that I would issue a brief decision on an expedited basis.

THE PARTIES' POSITIONS ON THE SCOPE OF THE APPEAL

The Claimant's counsel seeks to present evidence in the Appeal with respect to two issues. First, he seeks to tender a psychologist's report based on a recent assessment of the Claimant. I was advised that the report would address the Claimant's current state of mind and, in particular, the struggles that he is experiencing, as a youth, because of the severity of the disciplinary penalty. Second, the Claimant's counsel seeks to call the Claimant as a witness to testify to his goals and aspirations as a hockey player as well as to his remorse with respect to the impugned misconduct. I was advised that the Claimant will also testify to the remedial steps he has taken as a result of the incident.

Hockey Canada objects to any evidence being tendered in the Appeal. It argues that the Appeal is a review of the Adjudicator's decision, which includes any issues of procedural fairness. It contends that the Appeal should first deal with the standard of review of the Adjudicator's decision and then assess the Adjudicator's decision against that standard based on the parties' submissions.

ANALYSIS

I will briefly describe the investigation and adjudication process as it is important to my decision about the scope of the Appeal.

Hockey Canada utilizes an independent complaint management system (hereinafter referred to as "the ITP") to respond to complaints about maltreatment under Hockey Canada's Maltreatment Complaint Management Policy ("Complaint Policy"). The ITP is independent from Hockey Canada.

Upon receiving the complaint, Hockey Canada referred the complaint to the ITP. The ITP determined that it had jurisdiction over the complaint and assigned an investigator. The investigator met with the Complainant, the Claimant, and several witnesses, including others who were the subject of the complaint. The investigator made certain findings of fact, including the following:

> [The Complainant] pulled his pants and underwear partly down while crouched over the Complainant's face, he slowly lowered his exposed buttocks and anus over the Complainant's face until it touched it before standing back up.

Following completion of the investigation report, the ITP referred the matter to an adjudicative panel pursuant to the Complaint Policy. The ITP engaged the Honorable Anne M. Mullins, a retired judge formerly of the Ontario Superior Court of Justice to conduct the Adjudication process.

From a review of Adjudicator Mullins' decision, a pre-hearing video call took place on July 2, 2023 where certain procedural directions were made. The parties then attended and participated in a video hearing on July 5, 2023. Although the Claimant was represented by counsel and his mother, the Claimant did not attend the hearing. There is no dispute that the Claimant had the opportunity to participate in the hearing and could have testified if he chose to do so. I was advised by counsel that the Claimant was in no condition to participate in the hearing due to his mental state.

Adjudicator Mullins issued an 11-page decision on July 11, 2023 that, among other things, imposed a six-month suspension on the Claimant. The penalties were imposed against the Claimant and another Respondent. The complaint against several other respondents was dismissed.

The Canadian Sport Dispute Resolution Code (hereinafter "the Code") specifically addresses the powers of an arbitrator in an Appeal hearing. Section 6.11 of the Code reads as follows:

> 6.11 Scope of Panel's Review
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> (a) 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.
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> (b) The Panel shall have the full power to conduct a hearing *de novo*. The hearing must be *de novo* where:

(i) the SO did not conduct its internal appeal process or denied the Claimant a right of appeal without having heard the case on its merits; or

(ii) if the case is deemed urgent, the Panel determines that errors occurred such that the internal appeal policy was not followed or there was a breach of natural justice.

(c) No deference need be given by the Panel to any discretion exercised by the Person whose decision is being appealed, unless the Party seeking such deference can demonstrate that Person's relevant expertise.

Pursuant to s. 6.11 of the Code, a hearing *de novo* is required where the Sport Organization did not conduct its internal appeal process or the Claimant was denied a right of appeal without having heard the case on its merits. It is also required where the case is deemed urgent and errors occurred such that the internal appeal policy was not followed or there was a breach of natural justice. In the absence of these conditions, a hearing *de novo* is discretionary.

Pursuant to section 6 of the Complaint Policy, the Adjudicator's decision can be appealed directly to the SDRCC. This is what has occurred in this case. Thus, the conditions described in s. 6.11 of the Code that mandate a hearing *de novo* have not been met.

For the following reasons, I decline to exercise my discretion to allow a hearing *de novo* and direct that the parties proceed with an appeal process akin to a judicial review. There shall be no evidence tendered in the Appeal Process.

It is apparent from Adjudicator Mullins' decision that the parties had a full opportunity to tender any evidence that they wished the Adjudicator to consider in assessing the merits of the complaint and rendering the penalty. Any evidence about the impact of a severe penalty on the Claimant, his personal circumstances or general evidence about suspending youth from hockey could have been tendered at the hearing. To the extent the Claimant, through his representatives, made a strategic decision to not present such evidence, he must now live with that decision.

Counsel for the Claimant advised that the Claimant was not aware that the penalty could be as severe as it was. The difficulty with this argument is that the Complaint Policy explains that a suspension is a possible outcome. Paragraph 44(d) of the Complaint Process reads as follows:

> After considering the factors listed in paragraph 42 above, the Adjudicative Chair or Adjudicative Panel may apply the following sanctions, singularly or in combination:

> **d. Suspension** – Suspension, either for a set time or until further notice, from participation, in any capacity, in any program, activity, event, or competition sponsored by, organized by, or under the auspices of Hockey Canada. The reinstatement of a suspended Organization or Member Participant may be subject to certain restrictions or contingent upon the Organizational or Member Participant satisfying specific conditions imposed by the Adjudicative Chair or Adjudicative Panel and noted at the time of suspension;

The Complaint Policy makes it clear that the Adjudicator may impose a suspension. If the Claimant had relevant evidence to tender about the penalty, it ought to have been tendered at the time of the hearing when the Adjudicator was considering the evidence and applying the factors set out in the Complaint Policy. I do not accept that the Claimant was unaware that a suspension was a possible outcome.

Counsel for the Claimant stated that the Claimant was not in any condition to participate in the hearing process as he was emotionally distraught. I was not presented with any evidence that this was the case nor was this submission made to the Adjudicator. Had this submission been made to the Adjudicator, the hearing process could have been modified to accommodate and protect the Claimant with suitable safeguards. As a former judge, Adjudicator Mullins would have been sensitive to this issue and familiar with the usual safeguards employed in hearing processes. I am also aware from the Interim Relief Application that the Claimant has played in two hockey tournaments since the incident occurred. There was no explanation for why he was able to continue to play hockey, yet unable to participate in the hearing.

While I have some reservation about the relevance of a psychological report about the impact of the penalty that is prepared after the penalty has been imposed, this is information that could have been prepared and tendered to the Adjudicator as a factor to be considered in suspending a youth from minor hockey. If I were to permit the report to be part of the Appeal process, it is likely that Hockey Canada would seek to cross-examine the psychologist and also tender its own report. It indicated as much in its submissions at the Preliminary Meeting. It makes more sense for this information to be tendered before the original decision maker as part of her assessment of the appropriate penalty.

The Claimant's request to introduce evidence on a limited basis would also create the obvious problem of only part of the evidentiary record being considered. The Appeal process would be fraught with problems if I were to only hear the Claimant's evidence on narrow issues without having regard to the evidence about the incidents giving rise to the complaint. This is precisely the role of the Adjudicator under the Complaint Process.

If parties were permitted to tender evidence in an Appeal following an adjudication hearing, the Appeal process would be protracted as the parties refine arguments that ought to have been made in the first instance. It would result in a litigation process where the unsuccessful party could tailor their case to the Adjudicator's decision after it

had been issued. Moreover, it would risk re-traumatizing the complainant as he would be forced to deal with the incident again.

Not only would the Appeal Process become protracted, but the proceeding would not be consistent with the requirement for the Panel to "…conduct the proceedings to avoid delay and achieve a just, speedy and cost-effective resolution of the dispute" as set out in Section 5.7 of the Code. The Claimant has requested that this matter proceed expeditiously and the SDRCC has moved quickly to accommodate this request. To allow evidence to be tendered in the Appeal would result in multiple days of hearing and additional legal costs.

For these reasons, the Appeal process shall be conducted in a manner akin to a judicial review. The parties are encouraged to review the SDRCC's rich jurisprudence on the analytical framework applied in such appeals.

AFFECTED PARTY

The other issue that I must deal with is Hockey Canada's request to include the Complainant as an Affected Party. It argues that the Complainant could be adversely impacted if the suspension were quashed or reduced. Thus, it seeks to allow the Complainant to have full participation rights in the Appeal. The Claimant opposes the inclusion of the Affected Party in the Appeal Process as being unnecessary and risking re-traumatization.

The term "Affected Party" is defined in the Code as follows:

> (a) "Affected Party" « Partie affectée » means a Person who may be tangibly and adversely affected by an award of a Panel of the Ordinary Tribunal, such as being removed from a team or losing funding, and who is either accepted by the Parties or named by the Panel as an Affected Party;

As identified in the definition, usually an Affected Party is an athlete that might be displaced as a result of an SDRCC proceeding dealing with Team Selection or adversely affected in a Carding Dispute. I am not persuaded that the Complainant would be "tangibly and adversely affected" from a reduction or elimination of the penalty. On this point, I agree with the submissions of the Claimant.

Even if I am wrong about applying the definition of Affected Party, there is no reason to involve the Complainant as I have determined that the Appeal will be akin to a judicial review, which is focused on the Adjudicator's decision.

For these reasons, the Complainant is not an Affected Party.

As discussed with counsel for the parties, I have issued this decision expeditiously to accommodate counsel's schedule for preparation and discussions about a timeline for

Appeal submissions. I thank counsel in advance for their efforts to agree on suitable timelines.

Dated in Whitby, Ontario this 31st day of July, 2023.

Matthew Wilson