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

NO: SDRCC 16-0324

Ron Jacks
(Claimant)

AND

Swimming Natation Canada
(Respondent)

AND

Dominique Longtin
(Affected Party)

COSTS AWARD WITH REASONS

APPEARING FOR THE APPELLANT:
Ron Jacks (Coach)
Jordan Goldblatt (Counsel)
Jeff Hernaez (Counsel)
Peter Vizsolyi (Representative)

APPEARING FOR THE RESPONDENT:
John Atkinson (High Performance Director, Swimming Natation Canada)
Mark Perry (National Coach, Swimming Natation Canada)
Ahmed El-Awadi (CEO Swimming Natation Canada)
Brian Edey
Benoit Girardin (Counsel)

APPEARING FOR THE AFFECTED PARTY:
Dominique Longtin (Coach)
Patrick Goudreau (Counsel)
Véronique Leroux (Counsel)

Introduction

1. Following my decision to allow his appeal and appoint Ron Jacks to the FINA 2017 Championship team, the Complainant submits that he should be entitled to costs pursuant to section 6.22(c) of the Canadian Sport Dispute Resolution Code (the "SDRCC Code"). For the reasons that follow, I reject his request for costs in this matter.
2. Costs are only awarded on an exceptional basis so that sport funds may be spent on athletes, coaches and teams, rather than on disputes. The exceptional circumstances required for a costs award have not been shown here.

Submissions

Complainant's Submissions

3. The Claimant, Ron Jacks, submits that costs should be awarded on an exceptional basis under section 6.22(c) of the SDRCC Code.
4. The Claimant relies primarily on *Strasser v. Equine Canada* as a basis for an entitlement to costs because of the serious, intemperate and inflammatory accusations made with respect to the "other issue" that were not true.[1] The Claimant submits that the Respondent's raising of the "other issue" was prejudicial and made despite it having been deemed unfounded by the Respondent's CEO, Ahmed El-Awadi.
5. The Claimant advances two additional reasons for awarding costs in this matter: (1) the Claimant's success at arbitration; and (2) the Respondent's unwillingness to resolve the issue at the end of the arbitration hearing.

[1] SDRCC 08-0085 at para 62 [*Strasser*].

Respondent's Submissions

6. The Respondent, Swimming Natation Canada (SNC), agrees that section 6.22(c) sets out the relevant factors that must be present for a costs award to be made. However, the Respondent submits that there is no basis for a costs award in this matter.
7. The Respondent argues that the parties are to bear their own costs in a proceeding, that success at arbitration does not create an entitlement to costs absent other factors, and that its conduct during the proceedings was respectful and that its decisions were made in good faith throughout.
8. As for the "other issue", the Respondent submits that it had a *bona fide* belief that it was true, that it backed down from this argument at the hearing once it realized that the matter had been previously resolved, and it had agreed that it should not form part of the public decision because of its potentially prejudicial effect on both the Claimant and the Respondent. The Respondent also maintains that the matter only came up because the Claimant raised it by his conduct. Therefore, it cannot be raised now as a basis for costs.

Relevant SDRCC Code Sections

9. The relevant sections from the SDRCC Code are as follows:

> **6.22 Costs**
> a) Except for the costs outlined in Subsection 3.9(e) and Section 3.10 hereof and subject to Subsection 6.22(c) hereof, each Party shall be responsible for its own expenses and that of its witnesses.
>
> […]
>
> c) The Panel shall determine whether there is to be any award of costs and the extent of any such award. When making its determination, the Panel shall take into account the outcome of the proceedings, the conduct of the Parties and their respective financial resources, intent, settlement offers and each Party's willingness 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.

Analysis

10. The relevant factors for consideration in awarding costs in this dispute are found in section 6.22(c) of the SDRCC Code and include:

    (i) the outcome of the proceedings;

    (ii) conduct of the parties;

    (iii) financial resources of the parties;

    (iv) intent;

    (v) settlement offers; and

    (vi) willingness in attempting to resolve the dispute prior to arbitration.

In *Pyke v. Taekwondo Canada*, I applied the SDRCC Code's listed factors and the relevant principles underlying their application.[2] In that decision, I held that the SDRCC Code's costs sections must be interpreted in keeping with the SDRCC's purpose, which "is to provide an easily accessible means to resolve sport related disputes, many (if not most) of which will involve athletes."[3]

11. Costs will generally be negligible and should not require costs awards; however, there are some circumstances in which costs might be appropriate.[4] Specifically, costs awards may be appropriate where one party's conduct was without merit and caused financial harm to the opposite party.[5] To determine when costs are appropriate, the factors in 6.22(c) must be present. I will address the parties' submissions on these factors below.

[2] SDRCC 15-0273 [*Pyke*].
[3] *Ibid* at para 9.
[4] *Ibid* at para 10.
[5] *Ibid* at para 10.

(i) The Outcome of the Proceedings

12. The Claimant submits that because he was successful in his appeal of this decision, he should be entitled to costs. The Claimant commenced proceedings to overturn the Respondent's decision and appoint him as a coach. Given the circumstances in this matter, I allowed the appeal.[6] The Claimant was appointed as a coach and the Respondent incurred an additional $10,000.00 in expenses complying with my decision.

13. The drafters of the SDRCC Code made it clear that success on its own is not reason to award costs.[7] This is explicit in section 6.22(c): "*Success in an Arbitration does not mean that the Party is entitled to be awarded costs*."

14. Here, the Claimant was successful in his appeal but the costs incurred to pursue this matter are not exceptional so as to entitle him to costs solely based on his success at Arbitration. In the absence of the other enumerated factors, success alone at Arbitration will rarely fall within an exceptional case giving rise to a costs award.

(ii) Conduct of the Parties

15. If a party attempts to avoid proceedings or bog them down, this may factor into an award for costs. The conduct must deny the claimants such that it harms his or her interests and delays a decision. I do not find that either party behaved in this manner. In fact, I found the conduct of both parties and their counsel commendable in this instance.

16. When it became clear that an appeal was coming, the Respondent made it as easy as possible for the Claimant to move to an independently decided final result by waiving the SNC internal

[6] SDRCC 17-0324 [*Jacks*].
[7] *Supra* note 2 at para 11.

appeal and proceeding to this SDRCC arbitration. Following the decision, the Respondent fully complied with my ruling in this matter.[8] Therefore, there is no reason to find that this factor contributes to a costs decision for the Claimant.

(iii) Financial Resources of the Parties

17. The SDRCC Code limits costs awards to exceptional cases, so that sport funds are spent on athletes, coaches and teams rather than on lawyers and disputes. This goes to the core of the SDRCC's mandate to provide an easily accessible forum to resolve sports disputes. By limiting the availability of costs awards, the SDRCC has ensured that money is being spent on athletes, coaches and teams who are not parties to the dispute.

18. The Respondent submits that National Sport Organizations like SNC have a responsibility to all its participants and that costs awards should be made only exceptionally, given the limited funds that are available to the development of its sport. I agree with this submission. The financial resources of SNC should not be used to pay the costs of this dispute; its financial resources are better served elsewhere. Furthermore, as I decided in the *Pyke* costs award, coaches are not in the same position as athletes with limited resources, and therefore this factor does not favour the Claimant.[9] Therefore, this factor does not suggest awarding costs to the Claimant.

(iv) Intent

19. Bad faith is a factor for consideration in determining whether to award costs.[10] As Arbitrator Pound held in *Meisner et al. v. Equine Canada* that:

[8] *Supra* note 2 at para 13.
[9] *Supra* note 2 at para 16.
[10] *Supra* note 2 at para 17.

> […] as part of keeping the cost of resolving disputes as efficiently and inexpensively as possible, I do not believe it is desirable to routinely award costs in every case, especially where there is a dispute that is genuine and not tainted by bad faith.[11]

Submissions by both parties here with respect to bad faith focus on the "other issue" and whether its initial submission by the Respondent was evidence of bad faith. I find that the Respondent did not raise the "other issue" in bad faith or with malice.

20. Claimant's counsel raises *Strasser*, where Arbitrator Kelly noted that:

> [w]here there are serious, intemperate, and inflammatory accusations of a party and/or its representatives that simply are not supported by the evidence, and not found to be true, sanctions do need to be imposed to acknowledge and somewhat redress the cost and expense of answering such unfounded claims.[12]

21. The facts in *Strasser* are distinguishable from the facts here. In *Strasser*, the Claimant brought forward a claim that was found to be without merit and lacking a foundation from which to proceed with a claim. Arbitrator Kelly found that the Claimant brought the claim forward "in a manner that she knew or ought to have known would create significant difficulties for the Respondent organization, and in addition be costly to defend."[13] That is not what occurred before me here.

22. Although *Strasser* concerns inflammatory and false accusations, the principles underlying a costs award are the same: costs should only be awarded where the actions of one party are without merit and have caused financial harm to the other party. The Respondent did not argue the "other issue" in bad faith and it stopped pursuing the "other issue" once the error was made clear. The Respondent's submission, though potentially prejudicial, was not pursued once it became clear that it was irrelevant and unfounded.

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[11] SDRCC 08/0070 at page 8.
[12] *Supra* note 1 at para 62.
[13] *Ibid*.

23. The “other issue” was not raised as a means of harming the Claimant’s reputation. Although in error, the Respondent was primarily concerned that the Claimant was an improper fit as a coach and team member of Team Canada. Finally, the Respondent has maintained confidentiality with respect to the “other issue” and the “other issue” has not prejudiced the Claimant. Nor did the “other issue” prolong the amount of time to conduct the hearing.

(v) Settlement Offers

24. In some cases, unreasonable attempts at settlement may factor against a party.[14] I have no evidence of what settlement offers were made before or during the mandatory Resolution Facilitation in which parties took part. Therefore, there is no evidence that the Respondent acted unreasonably in its attempts to settle this matter.
25. The Claimant submits that costs should be awarded because of the Respondent’s unwillingness to appoint the Claimant as a coach following the hearing, and prior to my decision when I had granted both parties a final opportunity to settle. I do not accept this argument. The Respondent seriously considered that resolution proposal before responding by email on June 22, 2017. The Respondent believed that appointing the Claimant as a coach would be a breach of its Policy and would have caused complications with reopening its budget in the middle of the year. The Respondent should not be punished for rejecting a proposal which it felt was against its governing Policy and that had not arisen before.
26. I find that the decision not to appoint the Claimant as a coach was made in good faith. It was made in error by the High Performance Director, who is not a lawyer and who was not aware that he was violating principles of administrative law. In its submissions, the Respondent

[14] *Supra* note 2 at para 18.

maintains that any offers to the Claimant to settle this issue were made under the presumption that its coaching appointment decision was decided in accordance with SNC's Policy and with Team Canada's best interests in mind. Based on what I heard at the hearing, I have no reason to doubt this.

(vi) Willingness in Attempting to Resolve the Dispute Prior to Arbitration

27. Had one party made a clear effort to avoid arbitration through mediation and resolution facilitation, the opposite party's stubborn refusal to entertain such overtures may have been a relevant factor.[15]

28. The fact that this matter resulted in an arbitral decision is not reflective of an unwillingness on the part of the Respondent to resolve this issue with the Claimant. The parties proceeded to resolution facilitation and attempted to avoid a hearing, but given the timing of the event for which the coach was to be appointed and the difficulty in changing coaches at the last minute, it was not unreasonable for the parties to proceed to a hearing to resolve the matter.

Conclusion

29. Costs should only be awarded in exceptional circumstances so that the financial resources of National Sport Organizations may be properly spent on athletes, teams and coaches, rather than on disputes. The Claimant has not proven that his case is one of these exceptional situations. Both parties conducted themselves admirably throughout the hearing, despite the difficulty the case presented. Although the Claimant was ultimately successful in his appeal, I do not find that any exceptional circumstances exist to justify the awarding of costs.

[15] *Supra* note 2 at para 19.

30. The request for costs is rejected.

Signed on August 1st, 2017, in Ottawa, Ontario.

David Bennett, Arbitrator