

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

NO: SDRCC 17-0341

DUŠAN ALEKSIC  
(CLAIMANT)

AND

WATER POLO CANADA ("WPC")  
(RESPONDENT)

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**Attendees at hearing:**

For the Claimant: Dušan Aleksic, represented by Amanda Fowler and Dr. Emir Crowne

For the Respondent: WPC, represented by Benoit Girardin

## **DECISION**

### **OVERVIEW**

1. This case concerns a decision by Water Polo Canada (“WPC”), to deny Dušan Aleksic (“the Claimant”) funding under the Athlete Assistance Program (“AAP”), a direct financial assistance program of Sport Canada.
2. Mr. Aleksic filed an appeal with the SDRCC on December 20, 2017.
3. I held a preliminary call with the parties on January 23, 2018 to discuss the arbitration process. The parties agreed on a timeline to file written submissions and material. It was agreed that WPC would proceed first in the hearing, followed by the Claimant, with a final opportunity for WPC to reply. It was agreed that there were no affected parties.
4. The parties filed written submissions in accordance with their agreed-upon schedule and participated in a hearing by conference call on February 8, 2018.
5. On February 15, 2018, I issued a short decision with reasons to follow pursuant to Article 6.21 c) of the Canadian Sport Dispute Resolution Code (“Code”)
6. These are the reasons for my decision.

### **JURISDICTION**

7. The WPC’s Appeal Policy states as follows:

16.1. All differences or disputes shall first be submitted to appeal pursuant to the appeal process set out in this policy.

16.2. Any final decision made by the Panel that may lead to irreversible consequences for one of the parties may be exclusively submitted by way of application to the SDRCC or its successor, which will resolve definitively the dispute in accordance with the SDRCC Code, as amended from time to time.

16.3. Should a matter be referred to Arbitration or Mediation, all parties to the original appeal shall be parties to this Arbitration or Mediation.

16.4. The award rendered by the SDRCC or its successor shall be final and binding upon the parties.

8. My jurisdiction to hear this matter as a carding dispute was not contested. While there was an internal appeal with respect to two other issues – a letter of reprimand and removal from the National Team – those issues were not before me. I will have more to say about the Internal Appeal Panel's decision.

## **PRELIMINARY ISSUES**

9. At the commencement of the hearing, the Claimant raised a preliminary objection about the reply submissions of WPC. It was argued that the reply submissions filed by WPC were improper as they raised new material. The Claimant requested that the reply submissions be struck from the record.
10. WPC opposed the request and argued that its reply submissions were merely in response to the arguments raised by the Claimant in his submissions.
11. In response to my questions about which portion of the reply submissions were improper, the Claimant said that it was the majority of the reply submission that was inappropriate.
12. I denied the motion to strike the reply submission. In my view, this would have been a disproportionate result that unfairly

precluded WPC from making its submissions. However, I advised the Claimant that I was prepared to hear submissions on whether the proceeding should be adjourned to allow the Claimant the necessary time to prepare sur-reply submissions. I explained that, if there was any prejudice to the Claimant, I would entertain submissions on how to cure the prejudice in this case since we were only at the stage of written submissions and there was still an opportunity for the Claimant to present his full case. The Claimant declined to make any request for an adjournment or the right to file a sur-reply and the hearing proceeded.

13. The preliminary motion may have been persuasive if the Claimant suffered some prejudice or if it was procedurally unfair in a way that impaired the ability to present his case. However, this was not the situation. In this instance, the hearing had not yet started and there was an opportunity to cure any prejudice (although no prejudice was identified). Moreover, the Claimant had an opportunity during the course of the hearing to call evidence and make any submissions. In the end, there was no assertion that the Claimant suffered any prejudice and there was no request made for an adjournment.
14. At the commencement of the evidence called by WPC, the Claimant raised a second objection. He objected to the evidence of Justin Oliveira, WPC High Performance Director, because WPC did not provide a witness statement as it said it would in the preliminary meeting. I ruled that the testimony would be allowed and that I would entertain submissions from the Claimant at the conclusion of the evidence in chief about any

procedural fairness issues, including whether it was necessary to adjourn the proceeding to allow time for preparation of the cross-examination. At the conclusion of the examination-in-chief, the Claimant did not request an adjournment, nor were any submissions made about issues pertaining to procedural fairness.

## **WATER POLO CANADA ATHLETE ASSISTANCE PROGRAM POLICY**

15. As described in the Policy, the AAP is a sport-funding program that helps high-performance Canadian athletes to combine their sport and academic or working careers while training intensively in pursuit of world-class performance.
16. The AAP nomination criteria is as follows:

### **3.1 Water Polo Canada AAP nomination criteria**

AAP nominations will be on the basis of selection to the National Training Center Program. As Water Polo is a team sport, it is difficult to base selection to any program strictly on individual athletic performance and therefore subjective judgment is required. It is the responsibility of the Head Coach and Lead Coach to select the best possible group of athletes for the National Training Center Program. To fulfill this responsibility, the Head Coach will have a high degree of discretion and flexibility. This being said, the criteria outlined below will be the primary tool used by the Senior National Team Head Coach and Lead Coach in developing the national team depth chart and to select the National Training Center Team.

1. Individual/team play characteristics
2. Technical abilities and positional considerations
3. Tactical knowledge
4. Needs of the team to perform at the international level
5. Physical characteristics and attributes
6. Demonstration of personal characteristics required for

The information in this section will be used to determine an athlete's position on the Water Polo Canada depth chart, which will be updated annually and in accordance with the WPC AAP timeline as presented in section 5.1.

### **3.2 Prioritization of athletes for WPC AAP nomination**

WPC will prioritize carding nominations in the following manner in its AAP submission to Sport Canada:

- a. Athletes selected for and committing full time to the National Team Training Center Program, including athletes with WPC approved league contracts in the following order:
  - i. Athlete meeting the requirements SR1 and SR2 carding nominations (section 2.2.a) by having played minutes in an official game at World championships or Olympic Games. As previously stated in section 2.2.a of this document, in order for an athlete to benefit from an SR2 carding level, he or she must maintain a Top-13 ranking on the Water Polo Canada National depth chart applicable to that carding cycle.
  - ii. Athlete meeting the requirements of SR/C1 nominations as prioritized by the national team depth chart.
- b. Remaining carding allocations will be nominated using the following guidelines for prioritization of National Team Training Center Program or National Team Age Group athletes not able to commit fulltime to the National Training Center Program:
  - i. Ranking on the National Team depth chart.
  - ii. Required minimum commitment of 60 days to the National team Program over the course of the carding cycle
  - iii. Availability to attend key events as determined by the Senior National Team Head Coach
  - iv. Athletes must be in a training situation deemed suitable by the Senior National Team Head Coach

### **THE INTERNAL APPEAL**

17. On November 27, 2017 an Appeal Panel was constituted under the WPC Appeal Policy issued a decision in respect of two appeals filed by the Claimant. The Appeal Panel removed a letter of reprimand issued to the Claimant by WPC and also set aside the Claimant's suspension.
18. The Appeal Panel did not specifically deal with the carding issue. It noted that WPC had stated that the Claimant remained on the

depth chart and on the AAP carding list as an injured player for the 2017-2018 season.

19. WPC's decision to deny carding status was made subsequent to the Appeal Panel's decision. However, as I have already noted, there was no dispute that the carding issue was properly before me.

## **THE EVIDENCE**

20. The only witness that testified was Justin Oliveira, WPC's High Performance Coach. The Claimant made a statement at the conclusion of the hearing. Although the Claimant's statement was not sworn evidence and not subject to cross-examination, I have no reason to discount anything he said during the hearing. In my view, both Mr. Oliveira and the Claimant were genuine and forthright.
21. Mr. Oliveira testified that there is a core group of team members training in Calgary and five or six team members playing in professional water polo leagues. He explained that following the Internal Appeal Panel's Decision, the Claimant was reinstated as an active duty member with the senior men's team and remains in good standing.
22. Mr. Oliveira explained that being in good standing did not mean that the athlete automatically qualified for funding under the AAP. It was necessary for all athletes to either be committed to the National Team Training Center Program ("NTTCP") full-time or have an approved professional league contract.

23. Mr. Oliveira explained that it was important for WPC to have some degree of control over the quality of training. Thus, if athletes are not training at the NTTCP, they must have an approved professional league contract. WPC wants to ensure that the professional league meets its high performance standards.
24. Mr. Oliveira testified that although the Claimant recently provided WPC with a copy of the professional contract, the Swiss Professional League where the Claimant is a member, does not meet WPC's standards of performance. Mr. Oliveira testified that it was his view, and the view of the coaching staff, that the League is "...not conducive to developing high performance athletes". This is why, despite receiving a copy of the professional contract in January 2018, it remained unapproved. He explained that the coaches discussed the professional league, based on their own experience with professional water polo in Europe, on two occasions.
25. The first occasion when Mr. Oliveira and the coaching staff discussed the Swiss professional league was when they heard that the Claimant was playing professionally in Switzerland in September 2017. They looked into the quality of the league at that time and felt that it did not meet their expectations.
26. The second occasion that the Swiss professional league was considered was when they received the professional contract in January 2018. Again, the coaches looked into the quality of the league by examining the team's record, opponents and level of training and competition. According to Mr. Oliveira, the entire coaching staff agreed that the league was not conducive to high performance training.

27. Mr. Oliveira testified that not all athletes on the depth charts have carding status. He also stated that the Claimant was the only athlete on the national team playing professionally without an approved professional contract.
28. During cross-examination, it was put to Mr. Oliveira that WPC had received a letter from the professional team on which the Claimant plays. As the letter was received during the course of settlement discussions, WPC objected to its admissibility. I agreed to allow the line of questioning since it appeared that Mr. Oliveira was denying that there had been any communication from the professional team.
29. Briefly, the professional team offered to be flexible with the Claimant's commitments so as to accommodate WPC's training and competition schedule. Mr. Oliveira testified that he did not communicate with the professional team since it was the view of the coaching staff that the League was not meeting WPC's high performance training standards.

## **THE POSITIONS OF THE PARTIES**

30. The basis for WPC's decision is that the Claimant did not meet the criteria set out in Section 3.2 of the AAP. Specifically, it states that the Claimant is not committed full-time to the NTTCP and the Claimant did not have his professional contract approved by WPC.
31. WPC explained that committing to the NTTCP meant being located for training in Calgary and eventually moving with the

team to Montreal. It further explained that having a WPC approved league contract required a discussion between the Claimant and WPC about the professional league, and then securing WPC's approval before signing the professional league contract. WPC states that the Claimant did not meet either of these conditions. All other athletes in receipt of carding under Article 3.2 met one of these conditions.

32. The Claimant's arguments start with the Internal Appeal Panel decision. He asserts that the Panel erred by (a) not deciding the merits of the carding issue; (b) not deciding whether WPC satisfied its onus of proof; and (c) not deciding whether WPC interpreted and applied the Carding Policy appropriately.
33. The Claimant further argues that WPC failed to follow its policy as, among other things, there was no evidence that the Head Coach or Lead Coach took part in the decision making-process or considered the criterion stipulated in the policy.
34. The Claimant also challenges the criteria in the policy. He argues that with the absence of a definition for the NTTCP, it was arbitrary and improper to add Calgary as a criterion, since it could mean simply training all year. The Claimant further argues that WPC's rejection of the professional league contract had already been dismissed by the Internal Appeal Panel and was therefore deemed to be approved.
35. The Claimant also gave a statement at the conclusion of the hearing. Although it was not sworn evidence or subject to cross-examination, I have considered his statement in rendering this decision. The Claimant explained that he has been on the

national team since 2010 and has played in various European countries. He said WPC's decision has impacted him financially. When he signed the professional contract in Switzerland, he believed that he would still receive funding under the AAP.

36. The Claimant believes that he is training harder than others on the national team and that he is part of a good team in a competitive league. He had asked one of the coaches for assistance in securing a professional contract in Europe but did not receive any help from him. He felt that he had to sign the professional contract with the Swiss League team as it was his only opportunity.

## **DECISION**

37. There was no dispute that WPC had the onus of demonstrating the carding decision was made in accordance with the criteria stipulated by the AAP. Section 6.7 of Code states as follows:

### **6.7 Onus of Proof in Team Selection and Carding Disputes**

If an athlete is involved in a proceeding as a Claimant in a team selection or carding dispute, the onus will be placed on the Respondent to demonstrate that the criteria were appropriately established and that the selection or carding decision was made in accordance with such criteria. Once that has been established, the onus of proof shall shift to 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.

38. In *Christ v. SSC – SDRCC 16-0298*, Arbitrator Palamar summarized the relevant considerations as identified by

Arbitrator Pound in *Larue v. Bowls Canada Boulingrin, SDRCC 15-0255 (Pound, QC)*:

40. In *Larue v. Bowls Canada Boulingrin, SDRCC 15-0255 (Pound, QC)*, an accomplished athlete who in the past had been selected to the national team many times, challenged a decision not to select him again. Arbitrator Pound noted that the decision made by the team selection committee involved a great deal of discretion and so the applicable standard of review was that of reasonableness and not correctness. He referred to *Dunsmuir v. New Brunswick, [2008] 1 SCR 190*, in which the Supreme Court of Canada determined the difference between the terms "correct" and "reasonable", and explained what level of deference should be applied by a reviewing body respecting a decision made by an administrative tribunal.

41. Applying *Dunsmuir* in *Larue*, Arbitrator Pound concluded that there were three considerations that should guide an arbitrator when applying the "reasonableness" test. I paraphrase him as follows:

1. absent cogent evidence of error, he/she should be deferential, because a team selection committee composed of experienced experts "knows its business";
2. the arbitrator cannot rewrite the high performance policy or team selection criteria with a view to "improving" things or substituting a personal view of what they should be, because the organization knows the sport better than any arbitrator could;
3. the arbitrator's role simply is to determine if the team selection process was decided in accordance with the selection criteria and whether that outcome fell within a range of possible and reasonable outcomes, defensible in light of the facts and the team selection criteria.

40. Through the evidence of Mr. Oliveira, WPC explained its decision was based on Article 3.2 of the AAP nomination criteria.

Specifically, in order to qualify for carding, the athlete must either be committed full-time to the NTTCP or be playing under an approved professional contract.

41. The Claimant argued that it was not clear that NTTCP meant that it had to be in Calgary and thus WCP was reading into the criteria. I am not able to accept this characterization of the

criteria. The NTTCP is located in Calgary where several of the athletes train. I find it reasonable that, as part of WCP's objective of having its athletes train in high performance centers, a full-time commitment to the NTTCP means training at its location in Calgary. It was not denied that this was known to the Claimant and was the general expectation for all of the athletes on the National Team.

42. As for the approval of the professional contract, I accept Mr. Oliveira's evidence that there is a need to ensure that athletes receiving funding under the AAP are training in facilities that are conducive to high performance. This is a reasonable expectation. Mr. Oliveira testified that it was his view, based on his experience, shared by the coaching staff, that the Swiss League was not meeting WPC's high performance training standards. This is the type of conclusion that arbitrators should refrain from interfering with unless there is evidence that the conclusion is tainted by factors that are arbitrary, discriminatory or in bad faith.

43. In *Palmer v. Athletics Canada*, SDRCC 08-0080, a decision referenced in *Mehmedovic v. Judo Canada*, SDRCC 12-0191/92, Arbitrator Pound stated as follows:

Carding decisions, as in this case, should not generally be taken by arbitrators who, normally, do not have the specific experience require for the purpose. It is only when the decisions taken by the responsible authorities have been vitiated in some manner that arbitrators may be required to pronounce the decision that should have been taken (p.10)

44. Mr. Oliveira testified that the Swiss League is not competitive in water polo when looking at world rankings. He explained that other athletes competed in professional leagues on approved

contracts in France, Germany and Italy. Despite the able cross-examination of the Claimant's representative, Mr. Oliveira did not waiver in his position that the Swiss professional league did not meet the expectations of the coaching staff.

45. I am satisfied that WPC has satisfied its onus that the carding decision was made in accordance with the criteria stipulated by the AAP and that such criteria is reasonable.
46. The Claimant did not call any evidence to refute the evidence of WPC. Moreover, I was never provided with an explanation for why the Claimant did not provide a copy of the professional contract to WPC before it was signed. It was not until January 2018 that the professional contract was finally provided to WPC for review. I was not provided with any explanation why there was such delay.
47. The Internal Appeal Panel's Decision has no impact on my decision. WPC submitted that this hearing was *de novo*. The Claimant submitted that it was a carding appeal pursuant to Article 2.1(b) of the Code. From a review of the Internal Appeal Panel's Decision, it does not appear that the carding issue was before the Internal Appeal Panel. Rather, there were two issues before the Internal Appeal Panel: a letter of reprimand and the removal of the applicant from the National Team.
48. The Internal Appeal Panel ruled in favour of the Claimant with respect to both issues. The letter of reprimand was removed and the Claimant's suspension was set aside. The carding issue is a separate issue that was not before the Internal Appeal

Panel. However, it was clear that both parties argued the case before me as a carding dispute.

49. There is also nothing in the Internal Appeal Panel decision that approves the professional league contract. It was still open to WPC to consider the professional league contract under the AAP.
50. During the final submissions, the Claimant asked me to draw an adverse inference against WPC on two grounds. First, the Claimant points to the lack of objective evidence about the evaluation of the Swiss professional league. Second, the Claimant asserts that WPC failed to call the other coaches as witnesses.
51. I have no reason to draw an adverse inference against WPC. It participated in the hearing, called evidence in respect of the issues, and presented a persuasive case that it complied with the AAP nomination criteria. As I have explained, WPC established that the Claimant did not meet the criteria in the AAP nomination criteria. A party is not required to call every potential witness in order to make its case. The onus was on WPC and it was entitled to call the evidence that it believed would satisfy its onus imposed by the Code. With respect to the documentation, it was open to the Claimant to request production of the records or to seek an order for the arbitrator for such production. It did not do so in this case. Thus, in my view, it would be inappropriate to draw an adverse inference against WPC.
52. For the foregoing reasons, the Request is denied.

53. The matter of costs was not discussed during the hearing. My inclination would be to not award costs. However I retain jurisdiction to address any submissions on costs, provided such submissions are filed no later than seven days from issuance of these reasons.

Signed this 23rd day of February, 2018 in Whitby, Ontario.



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Matthew R. Wilson  
Arbitrator