

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

NO: SDRCC 20-0446

JEVON BALFOUR (Athlete)

(Claimant)

AND

WRESTLING CANADA LUTTE (WCL)

(Respondent)

AND

JASMIT PHULKA

(Affected Party)

Before:

The Hon. L. Yves Fortier, QC (Arbitrator)

Appearances and Attendances:

For the Arbitrator: Me Laurence Marquis, Assistant to the Arbitrator

On behalf of the Athlete: Marty Calder, Representative
David Collie, Representative
Jason MacLean, Representative
Emir Crown, Counsel
Amanda Fowler, Counsel
Tyler O'Henly, Student observer

On behalf of the WCL: Lúcas Ó'Ceallacháin, Representative, High Performance Director
Tamara Medwisky, Representative

On behalf of the Affected Party:
David McKay, Representative

DECISION WITH REASONS

30 March 2020

I. INTRODUCTION

1. Jevon Balfour (the Athlete) is a 25-year-old wrestler from Scarborough, Ontario, who competes in the 74kg category for Wrestling Canada Lutte (WCL).
2. Following a recent accident and medical procedure, the Athlete is now monocular (he has vision in one eye only).
3. The Athlete is appealing WCL's Case Manager decision (C-03) which upheld WCL's initial decision:

(...) that Mr. Balfour was ineligible to compete domestically or internationally and that his prior results from the Wrestle Off as part of the Canadian Team Trials – at which he won the 74 KG weight class -- would accordingly no longer be considered.

II. PROCEDURAL HISTORY

4. On 12 March 2020, at 9.30 am (EDT), I was appointed as Med-Arb Neutral by the SDRCC to hear an urgent matter. The decision had to be issued by 5:00 pm (EDT) on that day.
5. The competition in which the Athlete sought to compete was scheduled to commence the next day, on 13 March, and the Athlete would have been scheduled to wrestle in the qualification round on 15 March.
6. Accordingly, at 10:00 am (EDT) on 12 March, I convened a first telephonic conference with the parties.
7. Whereas the Athlete wished to proceed with a mediation, the WCL wished for the proceedings to continue as an arbitration.
8. I decided that, in the circumstances, the mediation had ended and that, pursuant to Article 6 of the Canadian Sport Dispute Resolution Code (SDRCC Code), the proceedings should now continue as an arbitration.
9. The Athlete requested the permission to submit additional material. I therefore suspended the hearing and invited the parties to reconvene once the additional material had been submitted.
10. The SDRCC informed the Athlete that WCL had identified Jasmit Phulka as an Affected Party and the Athlete agreed to the addition of Mr. Phulka (C-09).
11. I reconvened the hearing at 3:00 pm (EDT). The Athlete was now represented by Dr. Emir Crowne and Amanda Fowler.
12. After the Athlete's counsel had made their submissions, it became clear that some of the evidence submitted by WCL was not in the record.

13. WCL agreed with my request that the 5:00 pm (EDT) deadline should be revisited and that the new “hard stop” for my decision would now be noon (EDT) on 13 March.
14. It was also agreed that the chief medical officer of WCL would be heard as a witness.
15. The Athlete’s counsel, at my request, undertook to file closing submissions by 7:00 am (EDT) on 13 March.
16. WCL, at my request, agreed to contact Mr. Phulka’s coach and inquire if he wished to participate in the arbitration as the Affected Party’s representative.
17. I then decided to reconvene the hearing for 8:00 am (EDT) on 13 March.
18. On 13 March, the following also participated in the hearing: Mr. David McKay, Jasmit Phulka’s coach, on behalf of Jasmit Phulka as Affected Party, Dr. Jason Crookham and Mr. Scott Wass for WCL.
19. I then heard submissions from all parties.
20. The hearing ended at 9.36 am (EDT) and I issued my Initial Decision at noon (EDT).

III. APPLICABLE LAW AND OTHER RELEVANT RULES AND PROCEDURES

21. Section 6.7 of the Code provides:

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.

22. Article 5 of the Wrestling Canada Lutte (WCL) Internal Nominating Procedures 2020 Olympic Games issued in September 2019 (R-03) provides that:

5 – ATHLETE ELIGIBILITY

In order to be considered by WCL for nomination to the COC for team selection, all athletes must meet the following requirements at the time of nomination and maintain these requirements through the completion of the 2020 Olympic Games:

Be a Canadian citizen as per Rule 41 of the Olympic Charter;

Hold a valid Canadian passport that does not expire on or before February 9, 2021;

Be in compliance with all relevant United World Wrestling (UWW) and IOC requirements for eligibility; (...) (Emphasis added)

23. Article 5 of the UWW International Wrestling Rules (R-37) provides that:

Article 5 – The Uniform

To participate in United World Wrestling events, athletes of ALL age categories must comply with the UWW Uniform Guidelines. These Guidelines are intended to allow innovative design features in conformity with the rules and regulations for wrestling. (...)

It is prohibited to:

(...)

- Wear any object that might cause injury to the opponent, such as rings, bracelets, prosthesis, piercing etc.

IV. PARTIES SUBMISSIONS

A. The Athlete

24. The Athlete, Jevon Balfour, seeks to overturn the Appeal Screening Decision of WCL dated 11 March 2020 (C-03, para 1). In his Appeal, the Athlete requests that the “unfair, unreasonable and arbitrary” decision of the WCL be overturned (C-10). This decision, submits the Athlete, impacts his ability to compete and his financing, for which he is now ineligible.
25. The Athlete submits that following an eye injury and surgery, he was allowed, exceptionally, by WCL to wear goggles in a recent qualifying event, which he won. He submits that he should be allowed to participate with the same goggles in the Pan-American OG Qualifier.
26. However, stressed the Athlete, the necessity to wear goggles was only a “recommendation” from his doctor (C-05) who wrote: “The above name patient may partake in physical activity however, protective eyewear is recommended.”
27. The Athlete also refers to Dr. Crookham’s letter to UWW which states that “catastrophic eye injury in (sic) extremely rare in wrestling” (C-12, p. 6).
28. The Athlete is therefore willing to sign a waiver of liability to WCL and compete without goggles. The Athlete alleges that the idea of a waiver was suggested by his doctor, Dr. Chaudhary.
29. The Athlete also submits that there have been past instances where athletes have been allowed to compete even after the three-day time limit before the competition.
30. In addition, insists the Athlete, only injured athletes are submitted to a medical examination. They are consequently not judged on the same level as other athletes. Non-injured athletes may well be competing with injuries that are not visible or are not detected.

31. The Athlete submits that it is his legal right to determine whether he can compete and that a medical opinion should not prevent him from doing so.
32. The Athlete's counsel also submitted that the Case Manager had gone beyond the scope of his mandate, and that if the Athlete was not accommodated, it would be contrary to the Ontario Policy and guidelines on disability and the duty to accommodate (C-06) and Policy on ableism and discrimination based on disability (C-07).

B. Wrestling Canada Lutte

33. WCL submits that they have done everything in their power and have exhausted all avenues to allow the Athlete to compete, and that the decision that the Athlete could not compete was not taken lightly as it has an important impact on the Athlete's career.
34. WCL recalls that the UWW International Wrestling Rules forbid the use of any equipment likely to cause injury to other competing Athletes (art. 5, R-37).
35. WCL also stresses that every doctor who has examined the Athlete has concluded that it would be reckless and negligent to allow him to compete without goggles.
36. WCL also refers to the request for equipment approval which was submitted to the UWW on 22 January 2020 (R-25) and rejected on 4 February 2020 (R-24).
37. While WCL allowed the Athlete to participate in the qualifying event (wrestle-off) pending the UWW decision, this competition was within the exclusive remit of the WCL. WCL then requested the revision of the decision with different protective goggles to the UWW (R-13). It was again refused, although the UWW indicated it would be open to exploring the use of protective eyewear in the future, as had been done by World Rugby. This option could not, however, be examined and approved prior to the Olympics (R-06).
38. For the Athlete to be allowed to participate in the Pan-American OG Qualifier, although the UWW doctor provides onsite verification, WCL notes that it must also obtain a sign-off from the national federation medical team. Any decision would also have to be approved by the UWW in Lausanne before the competition.
39. WCL confirms that a waiver from the Athlete is not acceptable (R-01). The issue has already been discussed at length in the past weeks. Two highly specialized doctors as well as the insurer have refused to clear the Athlete. This is not solely an issue of risk but of the general future well-being of the Athlete.
40. Lastly, the WCL recalls that modifications to the participating athlete list can only be made three days before the competition pursuant to the UWW International Wrestling Rules (R-40). This deadline has already passed.

V. ANALYSIS

41. I commence my analysis with a reference to the email dated 12 March 2020 from Carlos Roy (UWW) to Tamara Medwisky (WCL) (R-01). It reads as follows:

The position of UWW, based on the advice of our medical commission and insurance provider, remains the same. In the interest in protecting the long term health of the athlete, it would be reckless and negligent to allow him to compete without protective eyewear. Despite the compelling case and data presented by Wrestling Canada Lutte to our Medical Commission we cannot accept a liability waiver in lieu of medical approval. Our rules clearly state that equipment that can potentially injure an opponent is not permitted. Until such a time as it can be proven that such protection poses no threat to opponents, or that he is medically cleared to compete, we will not permit this athlete to compete.

UWW has a duty of care to all athletes and follows the advice of our medical commission and experts carefully. To accept a liability waiver would ignore the expert advice on this issue.

Finally, on another note, we also remind Canada that no changes to the entries are permitted outside the 3 day window prior to competition.

42. This email is the last in a chain of emails during the previous many months between UWW and WCL which attest to the numerous attempts by the WCL High Performance Director to convince the UWW that the Athlete should be eligible to compete internationally in the Pan-American OG Qualifier taking place in Ottawa on 13-15 March 2020 (R-04, R-06, R-11, R-13, R-24, R-25, R-27).
43. Unfortunately for the Athlete, all of these efforts deployed by WCL proved unsuccessful and the Athlete was thus held ineligible to compete in the Pan-American OG Qualifier.
44. As a result, I had to determine first and foremost whether I was competent not only to overturn the decision of the International Federation that it will not permit the Athlete to compete, but also that changes for entry to the Olympic Qualifier should be permitted outside the three-day window prior to the competition.
45. For the following reasons, I answered these questions in the negative and ruled in my Initial Decision that:

7. As the Athlete eligibility is governed by the UWW, any decision which I would issue today allowing Jevon Balfour to compete, with or without eye protection, could not be enforced.

8. Accordingly, as the Request of the Athlete has become moot, I deny it.

and

12. Accordingly, on medical grounds, I would dismiss the request of the Athlete.

Eligibility of the Athlete to compete

46. I must recall that the Athlete's eligibility is dealt with in the UWW International Wrestling Rules. These Rules are very clear and their application is not disputed by the Athlete.
47. The Wrestling Canada Lutte (WCL) Internal Nominating Procedures 2020 Olympic Games issued in September 2019 (R-03), which I reproduce below for ease of reference, provide in Article 5 that:

5 – ATHLETE ELIGIBILITY

In order to be considered by WCL for nomination to the COC for team selection, all athletes must meet the following requirements at the time of nomination and maintain these requirements through the completion of the 2020 Olympic Games:

Be a Canadian citizen as per Rule 41 of the Olympic Charter;

Hold a valid Canadian passport that does not expire on or before February 9, 2021;

Be in compliance with all relevant United World Wrestling (UWW) and IOC requirements for eligibility; (...) (Emphasis added)

48. The United World Wrestling (UWW) registration process (R-40) dated 22 October 2019 provides as follows:

First of all, it was decided that the final deadline to replace an athlete or change his/her weight category before a Championship or Ranking Series is fixed at 3 days before the start of the competition. Note that it is before the start of the competition, not before the start of the concerned weight category. (Emphasis added)

(...) Between 3 days before the competition and the start of the competition, NO more change of the athletes will be allowed even in case of injury.

Based on this decision, the rule which allows a Federation to make changes in their entry list until midday the day before the start of the concerned weight category is no more valid.

49. The UWW 12 March email, (see *supra* para 41, R-01) leaves me with no alternative but to conclude that, even if I were to find, *quod non*, that the UWW's decision was not binding, it is obvious that if I decided that the Athlete could compete, with or without protection, my decision could never be enforced.
50. Accordingly, as I concluded in my Initial Decision, the Athlete's request has become moot and I have no alternative but to deny it.

Medical clearance for the Athlete to compete

51. As I did in my Initial Decision and for the same reasons, I will now address briefly the medical considerations which form part of the record.

52. Here again it is my opinion that the Athlete has not discharged his burden of proof, pursuant to Section 6.7 of the Code.
53. I note that after Dr. Chaudhary recommended that the Athlete could compete with protective eyewear, on 9 January 2020, WCL requested additional medical opinions.
54. All of the doctors opined that the Athlete could not compete without goggles.
55. In my Initial Decision, I accepted the evidence of Dr. Jason Crookham, WCL's Chief Medical Officer, confirmed by other doctors, that monocular athletes such as Jevon Balfour should not be allowed to compete without eye protection as the risk of injury leading to blindness is extremely high.
56. Although WCL repeatedly attempted to secure an exemption for the Athlete to be allowed to compete with protective eyewear from UWW, it was ultimately unsuccessful (R-01).
57. In this connection, the UWW International Wrestling Rules (R-37), which I reproduce below for ease of reference, are clear:

Article 5 – The Uniform

To participate in United World Wrestling events, athletes of ALL age categories must comply with the UWW Uniform Guidelines. These Guidelines are intended to allow innovative design features in conformity with the rules and regulations for wrestling. (...)

It is prohibited to:

(...)

- Wear any object that might cause injury to the opponent, such as rings, bracelets, prosthesis, piercing etc.

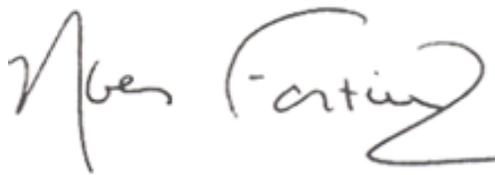
58. This, as Mr. Ó'Ceallacháin stated, is a “tragic decision”. It is clear that WCL recognizes that Mr. Balfour is a talented athlete. But WCL has gone above and beyond in trying to present his case and has exhausted all avenues.
59. I therefore see no need to address the Athlete's arguments whereby he seeks the permission to compete with protective eyewear as an accommodation for his disability and claims he suffers from discrimination under Ontario policies (C-06, C-07, C-12).
60. At this point, I open a parenthesis and take judicial notice of the fact that the Tokyo Olympics, scheduled to commence in July 2020, have now been postponed by the IOC to 23 July 2021, some 16 months from today (nearly one and a half year).
61. In this connection, I note that Mr Michel Dusson, the Secretary General of the UWW, in his letter of 3 March 2020 to Dr Jason Crookham (R-06), the medical director of WCL, wrote the following:

The information that was shared with the revision application also mentioned the process that World Rugby went through to introduce protective eyewear in the sport. It was mentioned that a global trial took five years before a certain type of goggles would finally be approved. While Rugby's experience would certainly reduce this time should UWW enter in such trial process, it would probably take a year or two to be able to deliver a Wrestling certification for the use goggles, and also have approved by the insurance. (see also R-11)

62. Accordingly, I invite WCL to communicate copy of the present Decision to UWW and request the International Federation to enter immediately into such a trial process with a view to obtaining a Wrestling certification for the use of goggles during the next Olympic summer games (Emphasis added).
63. I realize that such certification, if it is obtained, may not benefit the Athlete but it may well benefit, at future Olympic Games, other monocular wrestlers who, like Jevon Balfour, are well deserving of representing their country in the practice of their favourite sport.

VI. DECISION

64. Accordingly, I dismiss the request of the Athlete.

A handwritten signature in black ink, appearing to read "Yves Fortier". The signature is written in a cursive, flowing style.

Signed in Montreal this 30th day of March 2020.

The Hon. L. Yves Fortier, QC, Arbitrator