

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE REGLEMENT DES DIFFERENDS SPORTIFS DU CANADA (CRDSC)

No: SDRCC 21-0531

Between:

Joshua Malu
Claimant
and

Wrestling Canada Lutte
("WCL")
Respondent

Arbitrator: John H. Welbourn

Hearing: via telephone conference on January 26, 2022

Appearances:

For the Appellant: Self-represented
For the Respondent: Tamara Medwidsky (representative)
Will Russell (Counsel)
Michelle Kropp (Counsel)
For the SDRCC: Tanya Gates (case manager)
Marvin Huberman (observer)
Kathryn Oviatt (observer)

Witnesses:

For the Claimant: Joshua Malu
For the Respondent: Tamara Medwidsky

Reasons for Decision

These Reasons follow the Decision of January 31, 2022 and are delivered as required by Article 6.21(c) of the *Canadian Sport Dispute Resolution Code*.

Preliminary Matters:

1. I was appointed arbitrator on December 9, 2021.

2. A preliminary meeting with the parties was held by conference call on December 15, 2021 during which the hearing date was agreed and procedural matters were reviewed and understood. Included was the Arbitrator's direction that by 4:00 p.m. on Thursday, January 20, 2022 (EST) each party upload to the Case Management Portal all materials and records upon which the party intended to rely at the hearing and which had not already been uploaded.
3. WCL uploaded a witness statement and submissions by the specified date.
4. On January 24, 25, and 26, 2022, Mr Malu uploaded additional materials to the Portal.

Hearing:

5. The hearing was scheduled to begin at 2:00 p.m. (EST) on Wednesday, January 26, 2022. All persons attended at that time except Mr. Malu. At 2:15 p.m. the Arbitrator adjourned the hearing to 2:30 p.m. and requested the SDRCC case manager to attempt to contact Mr. Malu.
6. The hearing resumed at 2:30 p.m. with Mr. Malu present.
7. At the outset the parties reconfirmed their agreement that:
 - a. The conference call format of the hearing was satisfactory;
 - b. The arbitrator had jurisdiction to consider the issues and his decision would be final and binding;
 - c. The oral testimony of all witnesses would be given under oath or affirmation.
 - d. The oral testimony would not be formally recorded.
8. WCL Counsel objected to the late disclosure of materials by Mr. Malu and asked that the materials not be considered by the Arbitrator.
9. The late disclosed materials were emails and a 33 page document entitled "Supplementary Appendix". This document is a supplementary appendix to a manuscript entitled "A SARS-CoV-2 mRNA Vaccine-Preliminary Report". The text is extremely technical and not generally comprehensible by the lay reader. The emails contain some 45 hyperlinks to scientific journals and articles.
10. Mr. Malu submitted that he tendered the materials to support his belief that the manufacture of the COVID-19 vaccines involve the use of aborted human fetus material. This conflicts with his religious beliefs and he therefore refuses to be vaccinated against COVID-19.
11. WCL Counsel responded that the materials cannot be understood without the assistance of an expert. Regardless, the manufacture of COVID-19 vaccines is not in issue. The issue is whether Mr. Malu's personal beliefs constitute religious beliefs when considered objectively.
12. The Arbitrator concurred that the "Supplementary Appendix" could not be understood without the assistance of an expert. Further, the component elements and manufacture of the COVID-19 vaccines were not relevant. The late disclosed materials would not be considered further.

Issue:

13. Is Mr. Malu entitled to an exemption from WCL's policy requiring all participants in WCL sanctioned events to be vaccinated against COVID-19?

Facts & Evidence:

14. Mr. Malu is a member of the Ontario Amateur Wrestling Association and a registered participant of WCL. He has been involved in the sport of wrestling for at least 10 years.
15. On October 1, 2021, WCL posted a notice of its intention to implement a vaccination policy to allow wrestling competition to restart safely.
16. The proposed policy included the following statements:
 - a. Everyone over the age of 12 who is attending or participating in WCL in-person events or activities must be fully vaccinated against the COVID-19 virus.
 - b. Requests for accommodation will be based on two categories: medical and religion/creed.
17. On October 4, 2021, Mr. Malu emailed WCL requesting a general exemption on religious grounds from the mandatory vaccination requirement. The email cited or referred to 23 biblical quotations and included statements that components of the COVID vaccines contain material obtained from "willfully aborted human children".
18. Mr. Malu explained that his religious conviction and understanding of the contents of the COVID-19 vaccines led to his decision not to be vaccinated against the virus. He asserted that the *Canadian Charter of Rights and Freedoms* established his right to his requested general exemption from vaccination.
19. WCL responded advising that the proposed Policy had not been adopted and asked Mr. Malu to disclose the Christian faith he followed. Mr. Malu responded that he was Pentecostal Christian.
20. On October 28, 2021, WCL posted the technical package for the Huskie Open competition to be held in Saskatoon on November 26, 2021. The package included the vaccination and testing requirements for all participants and the following provision:

Participants seeking accommodation from the application of these requirements who qualify based on one or more of the protected grounds of discrimination in the applicable human rights laws, should submit their request to: Jennifer Stairs (jstairs@wrestling.ca) no later than November 12, 2021 at 5:00 pm ET. This request should include all applicable information and documentation.

WCL will conduct an assessment based on information submitted and make an independent determination.

*Requesting an accommodation does not imply that the accommodation will be granted.

21. On October 28, 2021, Mr. Malu sent Jennifer Stairs a request for exemption from the mandatory vaccination requirement for the Huskie Open. The email was a copy of his October 4, 2021 request for a general exemption sent to WCL. He did not provide any other information or material.

22. After the November 12, 2021 deadline for accommodation requests, WCL considered Mr. Malu's request and those of others. WCL declined Mr. Malu's request by letter dated November 18, 2021 which states in part:

For the reasons set out below, your request for exemption must be declined. The information provided does not support an exemption on creed /religious grounds. Specifically, your letter does not establish a sufficient connection between the teachings of your religion and an inability to receive a vaccination.

We considered whether it would be possible to accommodate you to allow you to participate in WCL sanctioned activities. However, given the nature of the activity, it is simply not possible for WCL to establish sufficient protocols to allow you to safely participate in activities without endangering the health and safety of your fellow competitors, participants, coaches, and officials.

23. Mr. Malu immediately responded that he wished to appeal the decision.

24. On November 19, 2021 WCL referred Mr. Malu's appeal request to an independent third party safe sport officer for review. Concurrently, WCL advised Mr. Malu that since he had not preregistered or registered for the Huskie Open as required, he could not compete in the event, even if his request for accommodation had been granted.

25. Later that day, the safe sport officer advised that he did not believe there were sufficient grounds for Mr. Malu's appeal. The officer stated that it was reasonable to decline the request based on communication of the mandatory vaccination requirements and the nature of the sport. Further, WCL did not intend to discriminate but to protect the health and safety of all participants.

26. The safe sport officer's decision was communicated to Mr. Malu on November 22, 2021.

27. In his evidence, Mr. Malu stated that he was confused about the deadlines for pre-registration and registration for the Huskie Open. He also stated that at the time he was training in Minnesota and didn't want to incur travel costs to attend the event if he could not compete.

28. Mr. Malu stated that he had tested positive for COVID-19 in July, 2021 and believed that he had antibodies to protect him from further infection and prevent transmission of the virus to others.
29. Finally, Mr. Malu noted that the technical package for the Huskie Open required all participants to provide a negative test prior to the competition.
30. On cross-examination Mr. Malu acknowledged that he had followed the Pentecostal faith for approximately 20 years. He had attended church services regularly although not often since the beginning of the pandemic. Mr. Malu also acknowledged that he had received prior vaccinations when he was young.
31. Mr. Malu acknowledged that the Pentecostal Church had not posted or published any information regarding COVID-19 vaccines. He confirmed that his anti-vaccination belief was based on his personal interpretation of the Bible unsupported by any Pentecostal Church teaching, and his understanding of the components of the COVID-19 vaccines.
32. Finally, Mr. Malu acknowledged that he understood that restrictions on events and public gatherings were largely governed by each provincial government and that based on current rules there were provinces in which he could not currently compete.
33. In her cross-examination, Ms. Medwidsky acknowledged that WCL had received several requests for accommodation on religious grounds from the mandatory vaccination requirement for the Huskie Open. None of the requests were granted.

Argument:

34. Mr. Malu's objection to vaccination is based upon his religious belief and scripture. He contends his personal belief is no less religious notwithstanding his church has not adopted the belief he derives from his Bible and other readings. WCL's refusal to grant the requested accommodation was a violation of his *Charter* right to freedom from discrimination on religious grounds
35. Mr. Malu also alluded to but did not specify an irregularity in the WCL internal appeal process.
36. Mr. Malu suggested that negative pre-event COVID testing and negative in-competition test results would provide adequate protection for all participants.
37. WCL argues that Mr. Malu has not established that objectively his personal belief and opposition to COVID-19 vaccination is rooted in religion.
38. WCL refers to Moore v. British Columbia (Education), 2012 SCC 61 and Bennett v. Canada (Attorney General), 2011 FC 1310 as support. It is not sufficient that a person assert a particular belief, claim the belief is sincerely held and that it is

religious in nature. There must be some objective evidence to prove a link between the person's stated belief and the religion.

39. WCL further submits that if Mr. Malu had established his belief was sincerely held, religious in nature and protected under the *Charter*, his right would be subject to limitations necessary to protect public safety, order, health, morals and the fundamental rights and freedoms of others.
40. The WCL COVID policy was adopted and satisfies the 3 part test set out in British Columbia (P.S.E.R.C.) v. BCGSEU, (1999) 3 SCR3 as the policy was:
 - a. Adopted for a purpose rationally connected to the purposes or goals of WCL , specifically to protect participants in a sport that requires intense and prolonged contact between participants, particularly athletes.
 - b. Adopted in good faith, based upon the belief that layers of protection - including vaccination, testing and masking - were necessary to run a safe event and limit the spread of COVID-19.
 - c. Was reasonably necessary to prevent the spread of COVID-19.
41. It was and at this point is not possible to accommodate Mr. Malu without undue hardship to WCL and all other participants in the Huskie Open and subsequent events.
42. Finally, WCL submits that it is moot to determine Mr. Malu's entitlement to an accommodation for the Huskie Open. The event has been completed. However, any restrictions on future events are unknown and subject to future federal, provincial/territorial or municipal regulations in effect at that time. Granting Mr. Malu a general exemption to any mandatory vaccination policy would be premature and exceed the jurisdiction of this tribunal.

Findings:

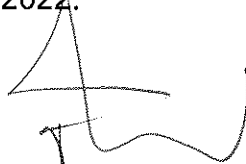
43. Mr. Malu is a religious man whose faith and beliefs are sincere. His refusal to accept COVID-19 vaccination is his right and deeply held.
44. However, Mr. Malu's beliefs relative to the COVID-19 vaccines are personal and not supported by the Pentecostal Church. He has not provided any objective evidence to establish that his opposition to COVID-19 vaccination is linked to any Church teaching or tenet.
45. Mr. Malu has not established that WCL's refusal to grant him an exemption from the Huskie Open mandatory vaccination requirement was contrary to his *Charter* right.
46. It is not necessary to determine if the WCL COVID policy of mandatory vaccination satisfies the 3 part test noted in paragraph 40 above.

47. An unspecified variance from WCL's internal appeal policy is not an issue properly before this tribunal.
48. This tribunal will not grant Mr. Malu a general exemption from WCL's mandatory vaccination policy. It isn't logical that a general exemption be granted when a specific event exemption is declined. Any exemption request should be considered on an event by event case basis.

Decision:

49. Mr. Malu's appeal is dismissed.

Dated at Calgary, Alberta, on February 9, 2022.

A handwritten signature in black ink, appearing to read 'J. Welbourn', is written over a horizontal line.

John H. Welbourn, arbitrator