

IMPORTANT NOTE: *This version constitutes an anonymized summary of the original 14-page decision.*

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

NO: SDRCC ST 23-0007

BETWEEN:

A.B.
(RESPONDENT)

AND

DIRECTOR OF SANCTIONS AND OUTCOMES
("DSO")

SUMMARY DECISION

Representatives:

Counsel for the Respondent: Joanna Birenbaum

DSO: Dasha Peregoudova

1. On September 12, 2023, Carol Roberts (the "Arbitrator") was selected under Subsection 5.3 (b) of the *Canadian Sport Dispute Resolution Code (2021)* (the "Code") to hear the Respondent's challenge of provisional measures imposed by the Director of Sanctions and Outcomes ("DSO").

OVERVIEW

2. The Arbitrator gives an overview of the role of the Office of the Sport Integrity Commissioner ("OSIC") in administering the *Universal Code of Conduct to Prevent and Address Maltreatment in Sport ("UCCMS")*, as per the applicable OSIC policies.
3. The general timeline of the case to date is as follows:
 - a. April 12 and 13, 2023: the OSIC receives two complaints in relation to actions by the Respondent on or before April 2, 2023.

- b. July 21, 2023: the OSIC provides the Respondent with a Statement of Allegations and recommends that provisional measures be imposed by the DSO.
 - c. August 23, 2023: the DSO imposes three provisional measures against the Respondent pursuant to section 7.1 of the UCCMS, pending final determination of the complaints.
4. Following discussions between the parties, the Respondent consented to Provisional Measure #1. After the DSO agreed to amend Provisional Measure #2, the provisional measures were as follows:
 1. **Restriction on activities outside of training-related and field of play.** [*“PM #1”*] *The Respondent is provisionally prohibited from attending and participating in any NSO-facilitated activities that are outside of the Respondent’s direct needs and responsibilities related to training and competition (i.e. NSO-organized team outings/activities and events such as galas), unless it is strictly required and respects the other Imposed Provisional Measures. For greater clarity, this term does not prohibit the Respondent from attending/watching [...] or competitions of other [athletes]. Where attendance at an NSO organized team outing is strictly required, it shall be documented by a coach and/or other NSO staff member.*
 2. **Restriction on contact.** [*“PM #2”*] *The Respondent is provisionally prohibited from being in contact, directly or indirectly, with any UCCMS Participant while under the influence of alcohol or recreational drugs.*
 3. **Restriction on contact with Impacted Persons.** [*“PM #3”*] *The Respondent is provisionally prohibited from being in contact with the Impacted Persons.*
5. A.B. challenges PM #2 as amended, as well as PM #3 on the grounds of procedural unfairness, irreparable harm and proportionality. A.B. also asserts that there is no evidentiary basis for the provisional measures imposed.

BACKGROUND

6. A.B. is a young adult, member of the National Sport Organization’s (the “NSO”) High Performance Centre and a former national team member of this NSO. A.B. has no prior discipline history with the NSO.
7. On April 12, 2023, the NSO notified A.B. of the complaints and suspended A.B. from attending, participating or “otherwise engag[ing] in any sanctioned [...] competitions, daily training or any other activity directly or indirectly related to [the NSO, its members, groups, partners and registrants] in **any** capacity until further notice.”

8. The complaints are as follows:

First complaint

A.B. and another athlete engaged in bullying type behaviour toward impacted person #1 after [an international competition] in 2023 [which constituted Psychological Maltreatment pursuant to section 5.2 of the UCCMS]; and

A.B. and impacted person #1 attended a party after [the international competition]. Drinking was involved. After the party, A.B. recorded a video of impacted person #1 lying naked curled up in the shower and then sent this video in the team group chat [which constituted Sexual Maltreatment pursuant to section 5.5 of the UCCMS].

Second complaint

As impacted person #2 was dancing next to A.B., A.B. became touchy. Impacted person #2 tried walking away, but A.B. grabbed impacted person #2's hips and pulled them right back to [them] [which constituted Sexual Maltreatment pursuant to section 5.5 of the UCCMS];

A.B. proceeded to start kissing impacted person #2 on the neck which was extremely uncomfortable as no consent was given [which constituted Sexual Maltreatment pursuant to section 5.5 of the UCCMS]; and

From there, impacted person #2 went to sit down but A.B. soon followed. A.B. pulled impacted person #2 to the bar all while being very touchy [which constituted Sexual Maltreatment pursuant to section 5.5 of the UCCMS].

ARGUMENTS

9. The Arbitrator summarizes the parties' arguments as follows:

Respondent

10. With regards to the first allegation, A.B. acknowledged taking a video of impacted person #1, which A.B. said was a good friend. A.B. indicated it was in keeping with the content shared between the group chat with A.B.'s teammates and that sharing videos was part of the team culture. A.B. denied that their actions constituted bullying and said A.B. took steps to delete the video A.B. said was shared by accident.

11. With regards to the second allegation, A.B. acknowledged that “everyone was drinking.” A.B. says it is difficult to respond given that it is based on second or third-hand information.
12. A.B. submitted that neither the OSIC nor the NSO considered A.B.’s response in imposing the provisional measures, nor was A.B. given the opportunity to address them until early September. A.B. therefore remained suspended for 3.5 months before receiving a communication from the OSIC.
13. A.B. explained the negative impact of the suspension on their mental health and well-being, namely creating depression and suicidal ideation.
14. A.B. argued that the provisional measures are a *de facto* continued suspension from the sport which A.B. has already been suspended from for over 5 months and that the delay is unfair and contrary to the OSIC’s Provisional Measures Guidelines.

DSO

15. The DSO submitted that she considered the factors of section 7.1 of the UCCMS and section 4 (c) of the OSIC Provisional Measures Guidelines, the allegations, responses of A.B., recommendations by the OSIC and all other information deemed relevant to the decision.
16. The DSO considered many factors in imposing the provisional measures, namely the nature of the allegations being related to Psychological and Sexual Maltreatment (if substantiated); the fact that there were multiple allegations and two complaints; potential risk to others if similar conducts were to reoccur; the balance between the safety of participants and the possible adverse impact of interaction with A.B. to the impacted persons, while minimizing consequences to A.B. pending a fulsome determination; the best interest of sport; the risk in imposing a full suspension of adversely or disproportionately impacting A.B. if the allegations are unfounded; and the fact that no determination was made by the OSIC regarding the strength or likelihood of success of the complaints.
17. With regards to the second complaint, the DSO suggested that it is appropriate to limit A.B.’s ability to interact with UCCMS Participants while under the influence of drugs or alcohol. She highlighted that the provisional measure does not limit A.B.’s ability to consume alcohol with non-UCCMS participants.
18. With respect to PM #3, the DSO contended that it is appropriate and within the principles of Abuse-Free Sport to limit A.B.’s contact with the impacted persons. She also submitted that the measures respected the best interests of the impacted

persons, considering that the measures taken must have the objective of avoiding re-traumatization.

19. Ultimately, the DSO contended that the measures are appropriate in the circumstances and should not be varied or cancelled.

Respondent

20. In reply, counsel for A.B. emphasized that irreparable harm and proportionality are key factors in this challenge, referring specifically to the delays and lack of timely communication as to the investigation process, as well as the impact on A.B.'s mental health, specifically since the DSO was informed of A.B.'s suicidality.

ANALYSIS

21. The challenge is brought pursuant to Subsection 8.5 (c) of the Code, which provides that the Safeguarding Panel has the power to:

... lift or to vary the Provisional Measure or to impose other measures as deemed appropriate after considering the following non-exhaustive list of factors:

- (i) If the provisional measure is protective in nature (such as a 'no-contact' order or area restriction), the extent to which the addition, removal or alteration of the provisional measure will bear on the risk of harm to the alleged victim(s) or other sport participants;
- (ii) The strength/likelihood of success of the Respondent's case;
- (iii) The interests of the Parties; and
- (iv) The extent to which the addition, removal or alteration of the provisional measure would bring into disrepute or endanger public confidence in the SDRCC and/or the concerned [sport organizations ("SOs")].

22. The Arbitrator, in her analysis, considers multiple factors, namely the fact that the complaints are based on as-yet unproven allegations, that the OSIC has yet to appoint an investigator, that the complaints have yet to be verified by the impacted persons and the fact that A.B. has no history of prior allegations. She also considers A.B.'s explanation of the events relating to the first complaint, which, in her view, should be given at least as much weight as the allegations.

23. The Arbitrator finds, for the reasons that follow, that PM #2 should be lifted and that PM #3 should be varied as indicated in the conclusion.

(i) Risk of Harm

24. The Arbitrator considers that since the parties agree to PM #1, there is no increased risk of harm to the alleged victims in lifting PM #2 and modifying PM #3.

25. The Arbitrator emphasizes that PM #3, as varied, limits contacts between A.B. and impacted persons and ensures that they will always be in a public area. The Arbitrator also considers the risk of harm as reduced, since the impacted persons are adults.

26. The Arbitrator also considers the risk of harm to A.B., as they have been suspended from their sport for over 6 months through the imposition of provisional measures in the face of a yet to be initiated investigation, which she deems deeply unfair. She considers the risk of harm to A.B. genuine and equally important as the risk of harm to the impacted persons.

27. As for PM #2, as varied, the Arbitrator finds that the prohibition on A.B.'s consumption of alcohol away from NSO-facilitated activities is overboard, especially since the provisional measures imposed in August did not reference alcohol use and she finds it unclear as to why if the restrictions were not warranted then, they would be appropriate now.

28. Ultimately, the Arbitrator finds there is no risk of harm to either the NSO or to the alleged victims/impacted persons to lift this measure considering the restrictions already imposed by Provisional Measures #1 and #3.

(ii) Strength/likelihood of success of Respondent's case

29. With respect to the first complaint, the Arbitrator considers that while A.B. made admissions with respect to the allegations, those allegations remain unverified as no investigation has commenced. She also notes that the complaints were not submitted by the impacted persons.

30. With respect to the second complaint, the Arbitrator believes the allegations are, at best, second hand, and the Investigator will be required to assess the credibility of the person making the allegations, as well as to gather evidence, if possible, from the impacted person.

31. The Arbitrator notes it is unknown whether the impacted persons intend to participate in the investigation, which has yet to commence. Therefore, it is

difficult to assess whether the passage of time will affect the memories of either the complainant or the impacted person in the second complaint.

(iii) The interests of the Parties

32. Parties in the context of Subsection 8.4 (b) are A.B. and the DSO.
33. Section 7.1 of the UCCMS provides that the OSIC must consider and weigh the following factors in deciding whether to impose provisional measures:
 - (i) the seriousness of the allegations and the facts and circumstances of the case;
 - (ii) the safety and well-being of participants and the sport community;
 - (iii) potential risks and prejudice from action and inaction, with safety being paramount; and
 - (iv) the best interest of sport and those who participate in it, including the views of the person(s) directly impacted.
34. The OSIC Provisional Measures Guidelines also provide that the DSO may also consider the following factors:

[...]

 - (vi) urgency, i.e. irreparable harm which is neither remote nor speculative, but actual and imminent;
 - (vii) the strength/likelihood of success of the respondent's case;
 - (viii) the potential impact on public confidence in the OSIC and/or the Sport Organization; and
 - (ix) proportionality of the Provisional Measure(s).
35. The Arbitrator emphasizes that the OSIC's Guidelines Regarding Investigation of Complaints (March 31, 2023) provides that "Investigation(s) will be initiated and performed without undue delay, considering the circumstances of the Complaint, the scope and complexity of the Investigation, the availability of the parties and witnesses, and the preparation required for the Investigation to proceed." Both the OSIC and the Independent Investigator are to communicate with the affected parties to keep them apprised of the advancement of the Investigation (Guidelines, 4.b).
36. The Arbitrator asserts that there has been no explanation for the delay in conducting the investigation, which in the context of the purpose of Abuse-Free Sport, is simply untenable. She considers that requiring parties to wait six months before an investigator is even assigned, brings the process into disrepute

and considers it is unfair to all the parties, including A.B., the alleged victim(s) as well as to the NSO.

37. The Arbitrator further explains that not only is the OSIC obliged to initiate a complaint investigation without delay, but A.B. also has an interest in having the allegations addressed expeditiously. Unexplained delays, at best hampering A.B.'s ability to pursue their sport, at worst causing A.B. irreparable harm, are deeply unfair to A.B.
38. The Arbitrator therefore concludes that efficiency and expediency of the investigation and the right of A.B. to an expedited hearing are important factors to consider in light of the "[e]xtent to which the addition, removal or alteration of the provisional measure would bring into disrepute or endanger public confidence in the SDRCC and/or the concerned SOs." [Code Subsection 8.5 (c) (iv)]
39. The Arbitrator concludes that there is a low probability that her ruling on provisional measures will bring the SDRCC or the NSO into disrepute or endanger public confidence in either of them, considering the above-noted circumstances (seriousness of the allegations, age of the impacted persons, the fact that the allegations are at best second hand, delay in the investigation and the corresponding harm arising from that delay).

CONCLUSION

40. The parties have agreed to PM #1. The Arbitrator lifts the DSO's PM #2 and varies the DSO's PM #3 to read as follows:

***Restriction on Contact.** The Respondent is provisionally prohibited from being in contact, directly or indirectly, with the Impacted Persons, with the following exception: Where the Respondent and the Impacted Persons are in training or competition facilities at the same time, in the course of their training or competitions, the Respondent will remain 10m from the Impacted Persons and/or will remove themselves and create distance if the Impacted Person(s) approach A.B. This Provisional Measure is not intended to act as a bar or restrict the Respondent from access to training or competition in the sport.*

DATED: October 6, 2023, Vancouver, British Columbia by Carol Roberts,
Arbitrator.