

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

NO: SDRCC 24-0704

BETWEEN:

B.R.

(CLAIMANT)

AND

HOCKEY CANADA (HC)

(RESPONDENT)

PRELIMINARY DECISION ON APPLICATION FOR DISCLOSURE

Appearances:

On behalf of the Claimant: Peter A. Abrametz, Counsel

On behalf of the Respondent: Adam Klevinas, Counsel

1. On March 6, 2024, I was appointed under section 5.3(b) of the *Canadian Sport Dispute Resolution Code* (the “Code”) to hear B.R.’s (the “Claimant”) appeal of a decision issued February 23, 2024, under article 6 of the *Code*.
2. Counsel for the Claimant has made an application for an Order for the disclosure of information, specifically an audio recording, that he asserts was made during an investigation process on which the decision was based.
3. This decision is based on the written submissions of the parties.

OVERVIEW

4. Hockey Canada (“HC”) is the national governing body for amateur hockey in Canada. Maltreatment complaints made to HC are managed by an Independent

Third Party (“ITP”) in accordance with HC’s *Maltreatment Complaint Management Policy*. (the “*Policy*”)

5. The Claimant, or B.R., is a 13-year-old hockey player with the [REDACTED] hockey team (the “Team”).
6. On February 7, 2023, the Team submitted a complaint (the “Original Complaint”) to the ITP alleging misconduct by T.C., a member of the Team, against another Team member.
7. During the investigation and adjudication of the misconduct allegations, the Claimant, who was a witness in the Original Complaint, asserted that T.C. had taken a nude photograph of him in a dressing room following a game on October 9, 2022. The ITP appointed an Investigator (“Investigator Gee”) who, following an investigation, prepared a confidential report concluding that the allegations against T.C. had not been substantiated. Investigator Gee interviewed the Claimant and determined that no inappropriate photos had been taken. Investigator Gee dismissed the complaint against T.C. In arriving at that conclusion, Investigator Gee made a finding that the Claimant had lodged a false report.
8. The ITP provided a redacted version of Investigator Gee’s report to the parties to the Original Complaint (that is, T.C. and HC) and assigned an adjudicative panel (“Adjudicator Smith”).
9. The *Policy* establishes a rebuttable presumption that an investigation report is determinative of the facts related to the complaint. Adjudicator Smith accepted the facts as found by the Investigator and dismissed the complaint against T.C.
10. Following Adjudicator Smith’s decision, T.C. filed a complaint against the Claimant, asserting that B.R. had made false allegations against him to cause T.C. to be suspended from playing hockey or to cause him reputational harm, contrary to Article 12 of the *Policy*. Article 12 provides that a participant “...who submits allegations that an investigator finds to be malicious, false, not made in good faith, or made for the purpose of retribution, retaliation or vengeance may be subject to a Complaint under the terms of the *Policy*...”
11. The adjudicative panel assigned to address T.C.’s complaint (Adjudicator Jebreen) found that, because the Claimant was a witness, rather than a party during Investigator Gee’s investigation, he had not been given the opportunity to rebut the facts as found by the Investigator. Adjudicator Jebreen ordered that B.R. be given a redacted copy of the Investigation Report and the original complaint, and directed T.C. and B.R. to provide submissions on the following issues:

- (a) Was there a significant flaw in the process followed by the Investigator?;
 - (b) Did the redacted report contain conclusions that are not consistent with the facts found by the Investigator?;
 - (c) Has [B.R.] submitted allegations that the Investigator determined to be malicious, false, not made in good faith, or made for the purpose of retribution, retaliation or vengeance?; and
 - (d) In the event that the answer to (c) is affirmative, what are the appropriate sanctions?
12. Both the Claimant (who was represented by counsel) and T.C. made submissions to Adjudicator Jebreen. The Claimant's submissions included an email from his counsel, Mr. Abrametz, as well as an affidavit from the Claimant's father (S.R.).
 13. Adjudicator Jebreen noted that in his affidavit, S.R. referred to some photographs in his possession. Adjudicator Jebreen's decision states that the Claimant's counsel submitted two redacted photographs, which he viewed in the process of deciding the matter.
 14. Adjudicator Jebreen considered the Investigator's summary of the Claimant's evidence of the October 9, 2022 incident, which was that T.C. pointed his phone towards him when he was coming out of the shower and threatened to send the photo he had taken to other people, that the Claimant could not confirm whether a photo was actually taken, and that no other persons could confirm seeing a photo of the Claimant naked coming out of the shower. Adjudicator Jebreen also noted that the Investigator did not find the Claimant's version of events completely credible. In particular, Adjudicator Jebreen noted that the Claimant did not have any corroborating evidence that an actual photograph had been taken and that he only made the allegation against T.C. after a fight in which he threatened to have T.C. and others removed from the Team.
 15. Adjudicator Jebreen considered the Investigator's reasons for finding that T.C. had not taken a nude photograph, including that there was no evidence of a photo; no other person admitted to either taking a photo or seeing one being taken; no other person heard any discourse between the players or saw the photo on a phone or posted on a social media account; and that the Claimant's description of the phone allegedly used by T.C. did not match the phone that T.C. owned.
 16. Adjudicator Jebreen considered the Investigator's findings that the Claimant threatened to have T.C. suspended on February 5, 2023, fabricated the October 2022 incident, and then used that incident to penalize T.C. by getting him suspended.

17. Adjudicator Jebreen then considered whether the Claimant had successfully rebutted the presumption established by those findings. Adjudicator Jebreen considered S.R.'s affidavit, including his assertion that he told Investigator Gee that he had a copy of the photograph taken in the dressing room and that he could provide it to the Investigator. Adjudicator Jebreen also noted S.R.'s sworn statement that the photographs "depict naked boys in the dressing room" and that they were "screen shots saved from Instagram...."
18. Adjudicator Jebreen found S.R.'s affidavit to contain "glaring omissions," specifically, at no point did S.R. state that the photographs were either taken by T.C., posted to Instagram by T.C., or that they were taken on October 9, 2022. Adjudicator Jebreen noted (para 54 of the decision) that "the two photographs have no dates on them and there is no indication that T.C. took them."
19. Adjudicator Jebreen further noted (para. 55) that in his affidavit, S.R.:

simply states "the boys that were taking these photos and posting them." [sic] He does not allege that T.C. took either of the two photographs or that they were taken on October 9, 2022 as B.R. alleged. These omissions are especially concerning given that this proceeding is about whether B.R.'s allegations were determined to be false.
20. Adjudicator Jebreen noted (para. 56) that while the photographs "do show nudity of boys in a dressing room" that was not at issue before him; rather, the issue was whether B.R. falsely alleged that T.C. took "the Photograph".
21. Adjudicator Jebreen further considered that S.R.'s affidavit raised credibility issues as S.R. swore that the two photographs were "screenshots from Instagram" when the initial complaint against T.C. was that T.C. had taken a nude photograph, not that the photo was posted to Instagram or any other social media platform. Adjudicator Jebreen further considered B.R.'s evidence that he was not aware of any nude photograph of him being posted to social media:

The Affidavit is silent on how or when B.R.'s Father obtained screenshots from Instagram given that the Photograph was not posted. This inconsistency suggests that the two photographs are likely not taken by T.C. as alleged by B.R. [reproduced as written] (paragraph 57)
22. Finally, Adjudicator Jebreen considered S.R.'s allegation that Investigator Gee failed to obtain the two photographs even after he offered to provide them and concluded:

Even accepting that these photographs were offered to the Investigator, such a flaw would not be significant here because, for the reasons noted above, the

photographs would not undermine the Investigator's conclusions relating to B.R. (para. 58)

23. Adjudicator Jebreen concluded that T.C.'s complaint that B.R. had made false allegations against him had been substantiated and that the Claimant had breached the *Policy*. Adjudicator Jebreen ordered that the Claimant be suspended from playing hockey until March 31, 2024, and ordered him to pay half of the investigation costs of the Original Complaint.
24. The Claimant's present appeal is against Adjudicator Jebreen's conclusion that he made a malicious complaint.

Argument and Analysis

25. The Claimant says, among other things, that there is evidence, specifically an audio recording, that would prove that he did not make a malicious complaint. In this application, he seeks an order for production of that evidence. HC asks that I deny the application.
26. Counsel for the Claimant contends that S.R.'s affidavit "proves" that Investigator Gee was informed that the Claimant's family had saved some of the inappropriate photographs taken in the dressing room from social media and offered those to the Investigator, who declined to review them on the basis that he already had that evidence.
27. Counsel argues that the photographs support the allegations made in the original complaint – that is, that there was a general desire to get phones out of the dressing room.
28. Counsel argues that "if the allegations against B.R. are not contained in the Original Complaint, which clearly, they are not, then presumably they are contained in the interview conducted by [Investigator Gee]" and that natural justice requires that this information be disclosed.
29. Counsel also argues that Adjudicator Jebreen failed to follow his own process by not affording the Claimant a "written hearing" and the possibility of oral submissions before the written hearing, and then Adjudicator Jebreen issued a final decision that was erroneously labelled an "interim decision." Counsel contends that this procedural irregularity necessitates a new hearing.
30. HC contends that the production request lacks relevance, that the audio recording made by Investigator Gee is not in HC's custody and control and therefore, HC cannot be certain it exists, and that even if it does, it is within the care and custody of Investigator Gee, over whom HC has no authority.

The Code

31. Rules regarding the production of documentary or other evidence are designed to ensure that parties have access to the information they need to argue their respective cases.
32. As there are no *Code* provisions specifically addressing production of documents, I have considered various rules for document production including Rules of Civil Procedure (see, for example, *Courts of Justice Act*, [R.R.O, Regulation 194) and the Rules of the Court of Arbitration for Sport (Rule A19.4).
33. Broadly speaking, the rules require that an applicant establish that the documents they are seeking are relevant to a material issue in dispute, that the documents exist and are in the possession of the party against whom the order will be issued, and that it would be unfair to the applicant to proceed without having discovery of the document.
34. The Claimant is seeking an order for the production of what counsel asserts is an audio recording of an interview between S.R. and/or B.R. and Investigator Gee which he contends “was misrepresented in the Gee Report.”
35. A redacted version of Investigator Gee’s report was provided to B.R. and S.R. during Adjudicator Jebreen’s consideration of T.C.’s complaint against B.R. along with a copy of the original complaint. Adjudicator Jebreen directed the parties to make submissions on four specific issues including whether or not there was “a significant flaw in the process followed by the Investigator.” In my view, had the Claimant believed, as he now appears to suggest, that Investigator Gee “misrepresented” the interview with S.R., he ought to have made that submission before Adjudicator Jebreen. Although the Claimant provided submissions in response to the Adjudicator’s direction, it does not appear that he raised the issue of disclosure of the audio recording, as Adjudicator Jebreen does not address it.
36. Adjudicator Jebreen offered the Claimant the opportunity to make submissions about whether, as he now argues, the interview with Investigator Gee was ‘misrepresented’. I find that, having failed to do so, he cannot now, in the context of this appeal, seek a production order for that information.
37. More importantly however, I am unable to find that the audio recording, if one was made, is relevant to the issue before me. The issue before Adjudicator Jebreen was not, as the Claimant asserts, whether “inappropriate photos” were taken in the Team dressing room and posted to social media or whether S.R. offered to provide them to Investigator Gee, but whether B.R. falsely claimed that T.C. took the photos, and that this false claim was made for purpose of retribution, retaliation or vengeance. There is nothing in the Claimant’s

submission that persuades me that the audio recording between Investigator Gee and S.R. and/or B.R. is relevant to the question of whether Adjudicator Jebreen's decision that B.R. had made false allegations, was reasonable.

38. I am also not persuaded that the production order would assist the Claimant in arguing that Adjudicator Jebreen denied the Claimant natural justice. That is an argument that can be advanced in the appeal without having Investigator Gee's notes or recordings.

39. I further note that any notes or records made by Investigator Gee, if they exist, are not within either HC or the ITP's custody or control.

CONCLUSION

40. The request for a Production Order is denied.

DATED: April 15, 2024, Vancouver, British Columbia

A handwritten signature in black ink, appearing to read "Carol Roberts". The signature is written in a cursive, flowing style with a large initial 'C'.

Carol Roberts, Arbitrator