

SPORT DISPUTE RESOLUTION CENTRE OF CANADA
SAFEGUARDING TRIBUNAL

BETWEEN:

[NAME REDACTED ("Respondent 1")] and [NAME REDACTED ("Respondent 2")]

Respondents

and

DEPUTY DIRECTOR OF SANCTIONS AND OUTCOMES

DDSO

and

[NAME REDACTED]

Interested Party

BEFORE: Peter Lawless, KC (Arbitrator)

DECISION ON CHALLENGE OF PROVISIONAL MEASURES

APPEARANCES

For the Respondents:	[Respondent 1]
	[Respondent 2]
	Michelle Kropp (Counsel)
For the DDSO:	David Kellerman
For the Interested Party:	[Interested Party]

PROCEDURAL BACKGROUND

1. This matter comes before me as challenges, filed with the Sport Dispute Resolution Centre of Canada (the "SDRCC"), to the imposition of Provisional Measures against two coaches, the Respondents, [Respondent 1] and [Respondent 2].

2. In the preliminary meeting I directed that this matter be heard as one proceeding because while filed as two separate proceedings, all the underlying facts are the same as they arise out of the same incident.
3. I further directed that an oral hearing take place and a timeline for the Parties' submissions was established.
4. The Parties filed submissions and an oral hearing took place on August 19, 2024.

PARTIES

5. The Respondent, [Respondent 1], is a professional diving coach and employed as a [position redacted] with [employer redacted].
6. The Respondent, [Respondent 2], is employed by [same employer, redacted] as [position redacted] of the [diving academy redacted] which trains out of the local club, [club name redacted ("Club")].
7. The [Interested Party] filed complaints with the Office of the Sport Integrity Commissioner (the "OSIC") after an incident in which his daughter, [name redacted ("Impacted Person")], landed badly after attempting a dive from the 10m platform at a [Club] event called [redacted ("the Event")] on March 17, 2024.

THE PROVISIONAL MEASURES

8. After receipt of the complaints the OSIC conducted a preliminary review and recommended the application of Provisional Measures by the DDSO.
9. In a decision dated June 28, 2024, the DDSO imposed the following Provisional Measures¹:

For the reasons set out above, the following provisional measure is imposed and the Respondent is instructed, until final determination of the Complaint, as follows:

1. *Monitoring – Supervision of Coaching Activities. The Respondent is provisionally prohibited from coaching and training and/or other related activities of youth athletes (under 25 years old) in an independent capacity. Another adult/coach, besides [Respondent 1], shall be present to supervise Respondent whenever he is coaching or training youth athletes (under 25 years old). The other adult (over 25 years old) must be present at all times whenever the Respondent is coaching or otherwise engaging in other such activities involving youth athletes. The Respondent is required to respect the "Rule of Two".*

¹ I have only reproduced the Provisional Measures imposed on [Respondent 2] but note that the Provisional Measures imposed on [Respondent 1] are identical other than, in [Respondent 1]'s case, [Respondent 2] may not be the other supervisor.

THE CANADIAN SPORT DISPUTE RESOLUTION CODE

10. The Canadian Sport Dispute Resolution Code (the “Code”) provides at Subsection 8.5(c):

8.5 Challenge of a Provisional Measure

(c) The Safeguarding Panel hearing a challenge of a Provisional Measure 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 an Interested Party 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.

11. The Code does not specify a specific standard of review to be applied in assessing the imposition of Provisional Measures. Accordingly, and consistent with the Supreme Court of Canada’s guidance in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, I find the appropriate standard of review to be that of “reasonableness”².

DISCUSSION

12. The DDSO acknowledges that his decision was necessarily made at a point in time, before full knowledge of the facts and circumstances (which will only be achieved after a full hearing on the merits.)

13. The DDSO also says, and I accept as true, that the imposed measures may be varied by the DDSO based on new information that may come to the DDSO prior to the hearing on the merits by way of the receipt of the final investigation report.

14. Just as the decision to impose the Provisional Measures was made at a preliminary stage so too is this decision on the challenge of those Provisional Measures. I do not have the benefit of a full hearing on the merits and with that comes a measure of risk that I may misapprehend, or not be aware of, some relevant facts³.

² The Code does prescribe Reasonableness as the standard of review when challenging a DSO decision on violation or sanction (at Subsection 8.6).

³ This is particularly true as the Interested Party says he has video evidence of the incident which contradicts some of the evidence of the Respondents and validates the Interested Party’s own evidence. That video evidence was not provided to me, but I am advised it was provided to the independent investigator whose report has not yet been published.

15. With these cautions in mind, I turn now to examine the imposed Provisional Measures.
16. The Respondents say the imposed Provisional Measures are absurd and unwarranted.
17. On the day in question the [Club] was holding an event called [the Event]. I understand that event to be a form of competition for a variety of categories of divers. [The Event] finished earlier than scheduled leaving some minutes of pool time still available, but unstructured.
18. At this point the adult volunteers at the [Event] started tearing down the event branding and concurrently a small group of divers, including the Interested Party's daughter, [the Impacted Person], carried on diving.
19. After previously successfully diving off the 3m and 7m platforms, [the Impacted Person] attempted the same dive from the 10m platform. Unfortunately, she over rotated and instead of entering the water feet first she entered on her bottom causing her pain and distress.
20. [The Impacted Person] was quickly attended to by several people including her father, the Interested Party, as well as coaches from the event, including the Respondents.
21. The Interested Party is himself a trained first responder and he gave evidence that he did not take [the Impacted Person] for any medical evaluation or to a hospital etc. Accordingly, I infer that while she was unquestionably hurt the degree of hurt was towards the lower end of the spectrum (fortunately).
22. A critical issue here is the adequacy of the supervision of [the Impacted Person] and, secondarily, determining who was responsible for her wellbeing and safety during this unstructured period.
23. The Interested Party says that [the Impacted Person]'s coaches were [Respondent 1] and [third coach name redacted ("the third coach")] and that he filed the complaints against [Respondent 1] and [Respondent 2] as "they were the senior coaches."
24. The Respondent, [Respondent 1] says he was not [the Impacted Person]'s coach, had no responsibility for her and wasn't even inside the pool deck but was instead outside dealing with the tear down. He says that [the third coach] was [the Impacted Person]'s coach at this period and that [Respondent 2] had some role in developing her programs but they were delivered by [the third coach].
25. The Respondent, [Respondent 2] was in and out of the pool deck while assisting with the tear down. He says he was coaching [the Impacted Person] earlier in the 1m event but that other than that his only responsibility for [the Impacted Person] was that he would develop training plans for [the third coach] to deliver to [the Impacted Person].

26. He says that he was not responsible for [the Impacted Person]'s supervision at the time of this incident but was on deck at the time of the failed dive and in fact, prior to her dive, turned on the bubbles to break the surface tension of the water making the moment of contact gentler.
27. A further [Club] coach, the aforementioned [third coach], was not assisting with the tear down but was instead on deck throughout the unstructured time period, watching the divers and making sure they were following the rules etc.
28. Lifeguards were also present providing supervision over all persons in and around the pool.
29. The Respondents appear to have acknowledged that it is at least unclear by [Club]'s policy as to who was specifically responsible for [the Impacted Person] at the time she dove off the 10m platform and hurt herself, but they point to the presence of [the third coach].
30. They further note that the [Club] has, because of this incident, now established a policy around the sort of "unstructured" time at the end of an event while also acknowledging that ending early is a very uncommon occurrence.
31. Additionally, it is acknowledged by the Interested Party that [the Impacted Person] called down to him to see if he thought she should try the dive. He acknowledges that he said it was up to her and if she felt comfortable with the dive.
32. On being questioned the Interested Party said it was [the Impacted Person]'s decision to attempt the dive.
33. The Respondents testified that as [the Impacted Person] had successfully completed the dive at both the 3m and 7m levels earlier that day, it was appropriate and safe for her to next try from the 10m platform. They say this is a totally normal progression.
34. The Respondents further expressed that they had no concerns with her attempting this dive and that it posed no extraordinary, unusual or unexpected risk noting that all diving comes with an element of risk.
35. At the end of the day the Respondents submit that this incident was nothing more than a failed dive as happens to all divers from time to time and that there was absolutely nothing untoward in their behaviour.
36. They again point to the supervision provided by the lifeguards and, critically, [the third coach], the [Club]'s coach on deck, watching over the divers at the time.
37. I find that the Respondents have a strong case to argue that this was no more than a diving incident, one that was well within what might be reasonably expected for a diver with [the Impacted Person]'s skill and training.

38. In terms of the interests of the Parties while it is perhaps understandable that the Interested Party wishes to see “punishment” for those he feels contributed to his daughter being hurt, that is not an adequate “interest”. It is also of significance to note that [the Impacted Person] is no longer diving with [Club] and has left the sport altogether.
39. The Respondents on the other hand, have a strong interest in having the Provisional Measures removed. They say that the imposition of any form of Provisional Measures is potentially harmful to their reputations.
40. I also find, for the purposes of this decision, that the presence of [the third coach] on deck was adequate supervision for the divers diving in this unstructured time, particularly when coupled with the presence of lifeguards.
41. I find that the failed dive was exactly that, a failed dive, one that was within the scope of [the Impacted Person]’s progression, training and capabilities.
42. This is a case where a diver over rotated in the air and as a result landed badly, hurting themselves. There is no amount of increased supervision that can prevent a diver from over rotating.
43. While it is incredibly regrettable that [the Impacted Person] was hurt when she over rotated, it is not possible to fairly attribute it that over rotation to maltreatment in any form whatsoever.
44. Accordingly, I find the imposition of Provisional Measures to be unwarranted and unreasonable.
45. To permit the continuation of the Provisional Measures in these circumstances would be an injustice and risk bringing not just the SDRCC but the safe sport system itself into disrepute.
46. I further question why the Interested Party selectively filed complaints against only the Respondents when another [Club] coach, [the third coach], was clearly on the pool deck and watching over [the Impacted Person] and the other divers at the time of the incident⁴. His response of filing against only “senior coaches” is inadequate in my view.
47. I also question why a complaint wasn’t filed about [Club]’s own supervision policies (or lack thereof) in place for this type of unstructured time at the end of an event as the claim is that inadequate supervision led to harm. One would expect such a complaint would be levelled against all who may be responsible and not only against two select coaches.
48. Given my findings above it is not necessary for me to delve into any person’s motivations or other matters surrounding the [Club] itself despite the parties raising various matters in their submissions

⁴ To be clear I am not suggesting in any way that [the third coach] failed to adequately supervise [the Impacted Person]. On the contrary, my finding is that the supervision provided by him was in fact adequate. I question the filing of complaints by the Interested Party against some, but not all, of the coaches present.

and at the hearing. Those matters and their ultimate disposition are appropriately left to the hearing on the merits.

DECISION

49. To be upheld as reasonable, the imposed Provisional Measures must be rationally connected to the purported harm, be designed to prevent similar harms in the future and be proportional to the future harms.
50. Here the purported harm is a claimed failure to adequately supervise a minor diver during unstructured time at the conclusion of an event. The imposed Provisional Measures do not actually address that purported harm.
51. The Provisional Measures imposed were to mandate the “Rule of Two.” However, at the time in question that rule was being respected by [Respondent 2] as he had [the third coach] present.
52. It is also beyond mystifying why any Provisional Measure whatsoever would have been imposed on Respondent 1 who wasn’t even present at the time of the dive and appears to have no particular responsibility for supervising [the Impacted Person] at the time.
53. A more appropriate action by the DDSO, in these circumstances would have been to evaluate the alleged facts and distil the risk that may need to be guarded against. In this matter that risk was of inadequate supervision during unstructured time.
54. The next step would be to determine how to best mitigate that risk going forward. In this case the [Club] itself is best positioned to ensure adequate supervision during unstructured time.
55. Accordingly, rather than imposing ineffective and unreasonable Provisional Measures selectively against specific coaches, the DDSO could have taken steps to either direct or recommend that the [Club] put in place specific policies to ensure adequate supervision in future occurrences of unstructured time. Such a step would have been rationally connected to the purported harm, been designed to prevent similar harms in the future and be proportional to those potential future harms.
56. In the circumstances of this case, a failed dive, the imposition of these Provisional Measures against these two coaches was unreasonable and unsupported by the facts before the DDSO.
57. For the reasons set out above the Provision Measures imposed on both Respondents are ordered removed.

Signed at Victoria, BC this 28th day of August 2024

Peter R. Lawless, KC

Arbitrator