

IN THE MATTER OF THE COMPLAINT

BETWEEN:

WRESTLING CANADA LUTTE

Intervenor

-and-

STEPHANIE BUCHAN

Complainant

-and-

LEIGH VIERLING

Respondent

DECISION AND REASONS

Hearing Dates: December 11th, 2020, April 12th, 13th, 14th, 16th, 2021

Decision Date: May 17th, 2021

Mr. Reid-Ellis
Counsel for Wrestling Canada

Ms. Emily Shilletto
Counsel for Stephanie Buchan

Mr. Robert Sawers
Counsel for Leigh Vierling

I. INTRODUCTION

- [1] This case involves a series of complaints that were filed by Ms. Stephanie Buchan (“Complainant”) with Wrestling Canada Lutte (“WCL”) against Mr. Leigh Vierling (“Respondent”).
- [2] The initial complaint was referred to an Independent Investigator, Ms. LeeAnn Cupidio (“Investigator”), who was engaged in September 2018 to determine if the Respondent’s alleged conduct was in breach of the *Occupational Health and Safety Act* (“OHSA”) and the *Harassment Policy* (Nov.1993) of WCL formerly known as the Canadian Amateur Wrestling Association (CAWA).
- [3] Following her investigation of the matter, the Investigator concluded that the Respondent had breached the OHSA and the *WCL Harassment Policy*. The Investigator’s findings were released on May 5th, 2019 in what has been referred to as the Cupidio Report.
- [4] The Complainant is a thirty-four-year old science teacher residing and working in the City of Calgary. She started wrestling in 1998 at the age of twelve where she began her wrestling career with the Jr. Dinos Wrestling Club in Calgary, Alberta. In or around 2004, she became a member of the WCL National team.

- [5] In 2009 the Complainant became a Certified Level 3 Wrestling Coach. She retired from the sport of wrestling in 2010. That same year she also completed her university education, graduating with dual degrees in Kinesiology and Education from the University of Calgary. Subsequent to her retirement from wrestling, she was successful in gaining employment with WCL in 2011 as the High Performance Manager.
- [6] The Respondent is a former wrestler who became one of Canada's well known and respected coaches. He was instrumental in Canada's success at the 2008 and 2016 Olympic Games as a coach of two of Canada's top female athletes, who each won gold medals.
- [7] He was often consulted on matters relating to training, performance and excellence. He is a father and up until this complaint, was a highly respected individual in the coaching community. The Respondent is no longer employed by WCL and has not been for some time.
- [8] The matter came before this Panel in August 2019. There were preliminary matters that involved applications and the coordination of the case. The rulings on the various applications have been filed and should form part of the ultimate case file record. I will not go into the details of those decisions as they have already been rendered and released.
- [9] The matter took some time to conclude. The two-year timeframe is not typical in the Panel's experience. Cases of this nature should be litigated and decided upon in a shorter

timeframe when possible. Parties should make all reasonable efforts to achieve this outcome.

[10] This case, however, was unique and the delay in arriving at a conclusion is explained by the following:

- a. There were a series of preliminary matters that needed to be determined prior to proceeding to the hearing. It is important for preliminary matters to be dealt with in advance of a hearing so that when the hearing commences, it is not further delayed by applications that could have been anticipated;
- b. There were a number of dates where the parties were not available making it difficult to proceed sooner;
- c. The Pandemic played a significant factor in the delay; and
- d. There was a death in my family and subsequently in the family of one of the Parties, resulting in the matter being further delayed by way of adjournments.

[11] It is unfortunate that the matter could not be decided upon sooner. The Panel does, however, recognize that there are realities of life and acknowledges the Parties' efforts in having the matter concluded.

II. POSITION OF THE PARTIES

- [12] The Complainant submits that she was subjected to workplace sexual harassment, as defined in the OHSA, by the Respondent while she was an employee with WCL and working with the Respondent.
- [13] The Complainant further submits that the Respondent's behaviour constituted harassment contrary to the provisions of the *WCL harassment Policy* and that the behaviour violated section 4.5 of the *CAWA Code of Ethics* (June 2003), section 17.2 of the *CAWA Coaching Code of Ethics* (April 2007) and the *WCL Code of Conduct* (June 2017).
- [14] The Complainant submits that the Respondent should be found to have committed infractions under section 14.5 of the *CAWA Discipline Procedure* (June 2008) and the subsequent *Discipline Policy* (February 2016), (July 2018) that would have been in effect at the material time. The Complainant submits that the Respondent be expelled from coaching or in the alternative, be suspended for a period of two years.
- [15] The Respondent submits that there is no jurisdiction for this Panel to hear the matter and/or sanction the Respondent because the Complainant and the Respondent were not employees/co-workers at the material time.
- [16] The Respondent further submits that the alleged incident did not occur in the workplace.

[17] Finally, the Respondent submits that it is for the Complainant to establish that the alleged infractions occurred.

III. BACKGROUND

[18] The Complainant first met the Respondent in 1998. She was 12 years old at the time and beginning her wrestling career with the Junior Dinos wrestling team. The Respondent was her coach. He became the Complainant's coach again, in or around 2004, when the Complainant became a member of the WCL National Team. The Respondent was the Women's National Coach at the time. He remained either the Complainant's direct coach or the Women's National Coach for the remainder of her competitive career.

[19] In 2011, the Complainant was hired by WCL as the High Performance Manager. She moved from Calgary, Alberta to Ottawa, Ontario for the role. The Respondent remained the Women's National Coach, in Calgary, Alberta.

[20] In her role as the High Performance Manager, the Complainant had a variety of responsibilities, including but not limited to the following: evaluating and managing national programs and teams; developing and implementing WCL strategic plans, policies and procedures; managing and coordinating nationwide programs, services, projects, training and events across operational units and cross-functional teams, while supporting conflicting priorities and deadlines; developing innovative nationwide training and collaboration events to enhance operational processes; and liaising with key stakeholders including government, customers and project teams.

[21] The terms of the Complainant's Employment Agreement stipulated that she was to take direction and instructions from WCL's Executive Director, Ms. Tamara Medwisky. She was to report to Ms. Medwisky. Her role as the High Performance Manager also required her to travel and participate in various meetings.

[22] The Complainant would have daily and/or weekly communications with the Respondent in relation to work and personal matters.

IV. THE COMPLAINT

[23] The Complainant alleges that the Respondent engaged in a series of inappropriate conduct. Specifically, that he engaged in:

- a. inappropriate communication;
- b. the use of inappropriate pet names and comments; and
- c. inappropriate touching ("the incident").

V. ISSUES TO BE DETERMINED

[24] The issues are as follows:

- a. Whether the communication between the Respondent and Complainant was inappropriate?

- b. If the communication was inappropriate, was it in contravention of any of the following: WCL Harassment Policy, Canadian Amateur Wrestling Code of Ethics, Canadian Amateur Coaching Code of Ethics, WCL Code of Conduct?
- c. Was the use of pet names and comments in text messages inappropriate?
- d. If the pet names and comments were inappropriate, were they in contravention of any of the following: WCL Harassment Policy, Canadian Amateur Wrestling Code of Ethics, Canadian Amateur Coaching Code of Ethics, WCL Code of Conduct?
- e. Did the alleged incident occur?
- f. If the alleged incident occurred, was it inappropriate?
- g. If the incident is found to have occurred and found to be inappropriate, was it in contravention of any of the following: WCL Harassment Policy, Canadian Amateur Wrestling Code of Ethics, Canadian Amateur Coaching Code of Ethics, WCL Code of Conduct?

VI. ANALYSIS

[25] In such a case, the standard of proof is a balance of probabilities.

[26] The burden is on the Complainant to establish that the Respondent engaged in the alleged conduct. That burden does not shift.

- [27] The Complainant must establish that, based upon the facts that have been presented, it is more likely than not that the Respondent engaged in behaviour as alleged in the series of complaints.
- [28] The analysis involved in making that determination requires that this Panel assess the evidence as it was presented in this hearing.
- [29] In the course of this matter, a number of materials were filed and exchanged. In coming to the determination, the Panel relied upon the evidence that was brought forth by way of viva voce evidence and/or exhibits that were filed and/or information that had been agreed upon by the Parties.
- [30] WCL brought an application to have Mr. Ilan Yampolski qualified as an expert witness in, among other things, the area of maltreatment relating to grooming and maltreatment by a person in authority. The applicable law and test for qualifying expert witnesses was set out in the case of *R v Mohan*, [1994] 2 SCR 9.
- [31] WCL had to meet the following four part-test: (1) expert evidence is relevant to the matter at hand, (2) expert evidence is necessary in assisting the panel in determining the issue that needs to be resolved, (3) there is no exclusionary rule that would prohibit the opinion from being included, (4) whether the individual is properly qualified either through training or through experience.

- [32] The Panel found that the application failed on the fourth point and the application was dismissed.
- [33] The Complainant was the only witness that testified on the substantive allegations.
- [34] Given that there was only one witness who testified in this case, it was important to assess the witness's credibility and reliability.
- [35] Credibility relates to the witness' sincerity, whether she is speaking the truth as she believes it to be. Reliability relates to the actual accuracy of her testimony. In determining reliability, a trier of fact will consider a witness's ability to accurately observe, recall and recount events in issue. A credible witness may give unreliable evidence.

A. INAPPROPRIATE COMMUNICATION

- [36] The Complainant alleged that while she and the Respondent were working together, they would travel together on behalf of WCL. The Complainant's evidence was that she received phone calls and/or text messages from the Respondent and that those messages involved personal matters, and/or they were invitations for them to meet alone for drinks.
- [37] The evidence heard in this case established that the Complainant and the Respondent had a very close relationship for many years. The two would communicate via Facebook Messenger as well as via SMS text messages, regardless of where they were situated.

- [38] The evidence from the Complainant was that she also had invited the Respondent to go for drinks at various times throughout their friendship.
- [39] The evidence established that she too would discuss personal matters with the Respondent and would seek his support and/or advice.
- [40] These forms of communication cannot be read in a vacuum. Context is important. The evidence must be considered in context of the circumstances. Those circumstances include the status of their relationship, the nature of the relationship, and the fact that the actions were reciprocated.
- [41] The Respondent and Complainant were not strangers to each other. In fact, they were close friends. The evidence was that they had a close and trusting relationship.
- [42] It is not uncommon for friends to ask friends out for drinks or to socialize. Nor is it uncommon for close friends to share matters of a personal nature.
- [43] I do not find that the communications were inappropriate given the context. I find that on a balance of probabilities, the Complainant has not met the burden of establishing that the communications were inappropriate. In my view, the communications were in line with the history of their longstanding relationship.

B. THE USE OF INAPPROPRIATE PET NAMES AND COMMENTS

- [44] The Complainant alleges that the Respondent would engage in inappropriate pet names and comments. The Complainant alleges that the Respondent would often refer to her as “hunny”, “my dear”, and “sweetheart” in some his communications to her.
- [45] The Complainant also alleges that the Respondent made inappropriate comments about the Complainant’s physical appearance, specifically that “you looked cute on TV”.
- [46] The evidence established that these two individuals had a longstanding relationship. In the course of that relationship, they would communicate repeatedly and frequently.
- [47] The Complainant testified that the Respondent had been using the terms “hunny”, “my dear” and “sweetheart” over the number of years they had known each other.
- [48] The evidence is that following the alleged touching incident, the complainant interpreted all of the comments made by the Respondent as being inappropriate.
- [49] There was no evidence that established the Respondent used those terms inappropriately as opposed to, for example, being used as terms of endearment when communicating with the Complainant.

[50] To find, on a balance of probabilities, that those comments were inappropriate, this Panel would need to have more evidence or information to put those terms in context. That evidence was not presented.

[51] The Complainant's own interpretation of what those messages may have meant is insufficient to return a finding that the comments were in fact inappropriate.

[52] I find that the Complainant has not met the burden with respect to this complaint.

C. THE INCIDENT

[53] While at a WCL meeting at a hotel, the Complainant visited the Respondent in his hotel room.

[54] During that meeting, while describing her concerns/stresses to the Respondent, the Complainant alleges that the Respondent began to massage her shoulders.

[55] The Complainant testified that this massage was consensual. In the course of massaging the Complainant's shoulders, the Complainant alleges that the Respondent moved his hands down her back and cupped her breasts in each of his hands.

[56] The Complainant did not consent to the touching of her breasts by the Respondent. The Complainant testified that she was shocked, and immediately removed his hands from her breasts and left his hotel room.

- [57] The Complainant was articulate in giving her evidence. She was detailed in the explanation of the alleged incident. I find her to be credible.
- [58] When asked why she did not report this incident right after it occurred, she testified that she did not want to hurt the Respondent, his family, or the sport of wrestling. She was less concerned for herself and more focused on the athletes, not wanting them to be negatively impacted by what may have been the fallout of her complaint.
- [59] I find the Complainant was honest and forthcoming about the limitations of what she was able to recall. She did not embellish her evidence with respect to the alleged incident.
- [60] The analysis of the evidence, however, does not end there.
- [61] I must also examine the reliability of the Complainant's evidence. In her examination in-chief, the Complainant had difficulties identifying various aspects of the incident.
- [62] Specifically, the Complainant did not know:
- a. When the incident took place;
 - b. Where the incident took place;
 - c. What happened immediately before the incident;
 - d. What happened immediately after the incident;
 - e. Whether or not the incident took place on a weekend or weekday;
 - f. The official business of the organization and why she would have been at that meeting;

- g. How she arrived at that meeting, by plane, train or otherwise;
- h. Who else was at the meeting, other than the Respondent; and
- i. The time of day of the alleged incident.

[63] This incomplete information makes her evidence unreliable.

[64] These challenges became more pronounced in cross-examination. The high-water mark for the Complainant was in her response to when the incident took place. The Complainant testified that “it occurred in late fall of 2012 or early 2013, I believe it happened after the 2012 Olympics. That is my timeline, I think.”

[65] One or two of these challenges on their own may not have had an impact on the reliability of the witness. It is, however, the constellation of these challenges which in my view, make it troubling for this Panel to attach the weight that is required to her evidence.

[66] Details matter. In my view, it would be an error of law for this Panel to accept that the Respondent committed the offences as alleged, even on a balance of probabilities.

[67] I do not find the Complainant’s evidence reliable.

[68] The Complainant also advances the argument that I should draw an adverse inference from the fact that the Respondent “refused to testify”.

[69] I do not agree with this submission. In fact, I reject it outright. The Parties referred this Panel to Justice Sopinka, Lederman and Brian's excerpt from the *Law of Evidence in Canada* that states, "in Civil cases, an unfavourable inference can be drawn when in the absence of an explanation, a party or litigant does not testify..."

[70] In order to apply that approach, a prima facie case needs to be made. In this matter, we lack that basic evidentiary foundation. It is unclear as to when, where, and under what specific circumstances the alleged incident would have occurred.

[71] There may be a number of reasons why the Respondent chose not to testify. I cannot draw an adverse inference from the Respondent choosing not to testify against allegations that were not established. Individuals like the Respondent have options available to them. The fact that he chose to use his discretion and not testify, in my view, does not give rise to an adverse inference.

[72] It is a matter of fairness to the Respondent. To draw an adverse inference in this particular case with these specific set of facts, and with the evidence that has been presented to me, would be an error.

[73] In my view, that argument cannot be sustained. This Panel cannot and does not draw an adverse inference from the Respondent's choice to not testify.

VII. DECISION

- [74] The Complainant requested an Order applying the implied undertaking rule to this proceeding. Specifically that all documents and evidence exchanged in this matter are only to be used in the context of this hearing and cannot be used for any collateral use. That request will be granted and the Order is made.
- [75] Pursuant to s. 28 of the *Discipline Policy*, the results of the Disciplinary hearing should be published on the WCL website unless the Panel orders otherwise.
- [76] The sport of wrestling has been the subject of much negative criticism. In December 2018, the Bennett report was released. It cannot be described as a favourable report about the sport of wrestling and the wrestling culture.
- [77] We have learned from the Bennett, and similar reports that transparency in sport is something that has been lacking for a number of years. Athletes and coaches have repeatedly spoken about how they were unaware of their rights and related procedural issues in sport.
- [78] Transparency is important. Transparency is necessary. Those involved in sport must be made aware that there will be consequences for their conduct. The sport participants must be made aware that there are structures in place that allows for complaints to be heard.

[79] By not publishing this Decision, this Panel would be a co-conspirator in perpetuating the problem that already exists. In short, this Panel would be part of the problem instead of being part of the solution. It is for the reason that I am exercising my discretion pursuant to s. 28 of the *Discipline Policy* to have the entire decision published.

[80] I find that the evidence presented in this matter did not establish that the Respondent committed any of the infractions alleged in the complaints.

[81] In light of this finding, this Panel need not consider the other questions at issue.

[82] All complaints against the Respondent are dismissed.

Dated: May 17, 2021



Michael A. Smith, Arbitrator