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Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2002/A/362 IAAF v/CAS & Zubek

ARBITRAL AWARD

delivered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition

- President: Mr. David Rivkin, attorney at law, New York, USA
- Arbitrators: Prof. Christoph Vedder, Munich, Germany
- Dr. Gerhard Bubnik, attorney at law, Prague, Czech Republic

in the arbitration between

International Association of Athletics Federations (IAAF), Monaco
Represented by Mr. Mark Gay, attorney at law in London, Great Britain

and

the Czech Athletic Federation, Prague, Czech Republic
represented by its General Secretary Mr. Frantisek Fojt

and

Mr. Roman Zubek, Czech Republic

* * * * *

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1. On 13 May 2000, respondent Roman Zubek ("Zubek"), a sprinter, submitted to drug testing at the Prague Championships in the Czech Republic. On 11-15 and 27-28 July, the Prague laboratory acting for the respondent Czech Athletic Federation ("CAF") found that Zubek's "A" sample contained dehydroepiandrosterone ("DHEA") at a concentration of 898 ng/ml (later corrected to 1098 ng/ml) and an elevated testosterone/epitesterone ("T/E") ratio of 5.2:1 (later corrected to 5.23:1). (Witness Statement of Dr. Ruzena Slechtova). On 12 September 2000, analysis of the "B" sample confirmed this result with an uncorrected DHEA concentration of 898 ng/ml and an uncorrected T/E ratio of 5:1. (Id.) These results differed markedly from those of Zubek's earlier tests: DHEA concentrations of 67 ng/ml (2 February 1997) and 29 ng/ml (30 January 1999) and T/E ratios of 1.02:1 (2 February 1997) and 1.12:1 (30 January 1999). (Id.) These results also differed from Zubek's negative tests conducted independently and subsequently: DHEA concentrations of 69 ng/ml (11 December 2000) and 35 ng/ml (11 May 2000). (Id.)
2. On 30 August 2000, the CAF, the member federation in the Czech Republic of appellant International Association of Athletics Federations ("IAAF"), notified Zubek that he was to be provisionally suspended beginning on 3 September 2000. (Letter from Frantisek Fojt to Roman Zubek).
3. On 27 September 2000, the CAF sent notice to the IAAF of the positive result.
4. The CAF Disciplinary Commission then met, with Zubek present in both instances, on 4 and 25 October 2000 to discuss the case further. (Records of CAF Disciplinary Commission Meetings). At the second meeting, Zubek requested additional testing of his sample in order to distinguish between endogenous production and exogenous administration of DHEA. (Record of 25 October 2000 CAF Disciplinary Commission Meeting). On 31 October 2000, however, Zubek and his coach sent a letter to the President of the Commission requesting that there be no further testing on the grounds that the sample was "relatively too old." (Letter from Roman Zubek and Ludvik Svoboda to Miroslav Sevcik). Apparently unaware of Zubek's reversal, the Prague laboratory sent the residual "A" sample to the Cologne Laboratory for isotope radio mass spectrometry ("IRMS") analysis on 13 November 2000. (Witness Statement of Dr. Ruzena Slechtova). Zubek did not have a representative present to observe the

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sealing of the sample. However, there do not appear to be any rules requiring an athlete's presence in these circumstances.

5. The CAF Disciplinary Commission met again on 20 November 2000 with Zubek present. After discussing its concerns with the positive finding, the Commission decided to cease Zubek's temporary suspension and not to punish him further. The Commission explained:

The Disciplinary Commission will not punish Roman Zubek for the positive test result of the DHEA urine sample for the reason that they have the opinion [that] the found substance is [the body's] own substance. There is no limit for this substance in the body that should be understood as doping given by any competent authority (COC, IOC, and AC CR). As a matter of principle, the Disciplinary Commission of the Czech Athletic Federation cannot fairly evaluate the quantity of the substance in the body, if it was delivered artificially or if it was a body-own quantity. (Record of 20 November 2000 CAF Disciplinary Commission Meeting)

6. The CAF reported this decision to Zubek in a 21 November 2000 letter stating "the Disciplinary Committee of the Czech Athletic Federation considers therefore the disciplinary proceedings with you as being settled." (Letter from Miroslav Sevcik to Roman Zubek).
7. The CAF reported this decision to the IAAF on 12 December 2000.
8. Four days prior to the CAF's letter to the IAAF, however, the Director of the Cologne laboratory had informed the head of the Prague laboratory that the IRMS test confirmed use of DHEA. (Fax from Dr. Wilhelm Schanzer to Dr. Ruzena Slechtova). The Prague laboratory communicated these results to the IAAF on 12 December 2000. (Letter from Dr. Ruzena Slechtova to Dr. Gabriel Dolle). Thus, on 20 December 2000, the same day it received notice of the CAF decision, the IAAF suggested to the CAF that it review Zubek's case again in light of these results. After additional correspondence did not produce a follow-up hearing, on 13 February 2001 the IAAF formally asked the CAF to consider the IRMS results. On 27 February 2001, the CAF general secretary informed the IAAF that "the National Board of CAF had confirmed the decision of the Disciplinary Committee of 20th November 2000 not to open the disciplinary procedure against Roman Zubek." (27 February 2001 Fax from Frantisek Fojt to Dr. Gabriel Dolle).

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9. In April 2001, the IAAF once again asked the CAF to reconsider its decision and to inform IAAF on the final decision accordingly as soon as possible. It sent to the CAF the IAAF Anti-Doping Commission science adviser's analysis of Zubek's case, as well as some related scientific literature. (20 April 2001 Fax from Dr. Gabriel Dolle to Frantisek Fojt). In response, the CAF General Secretary wrote the IAAF Anti-Doping Officer that he "suppose(d)" that after additional meetings on 14 and 15 May 2001, he would "be able to inform you about a final decision." Mr. Fojt of the CAF, in a 17 May 2001 fax reporting the findings of the Disciplinary Commission from the 14 May 2001 meeting, informed the IAAF of two reasons why the Disciplinary Commission refused to "change its decision": (1) it "did not receive the reference to the concrete rule stating exactly the volume of DHEA no longer allowed in the body;" and (2) it believed that "the proof obtained by the isotope analysis in the Cologne laboratory has not been earned by the standard way. The rest of the urine specimen A not sealed in the presence of Mr. Roman Zubek has been mailed to Cologne." (17 May 2001 Fax from Frantisek Fojt to Dr. Gabriel Dolle).
10. The IAAF responded to this decision by requesting in May 2001 from the head of the Prague laboratory documentation showing adherence to IAAF chain of custody standards. (6 June 2001 Fax from Dr. Gabriel Dolle to Dr. Ruzena Siechtova). When it finally received that documentation on 18 September 2001, the IAAF sent it the next day to the CAF and once again asked the CAF to change its decision and to "conclude this evident DHEA positive case in conformity with the IAAF Rules." (19 September 2001 Fax from Dr. Gabriel Dolle to Frantisek Fojt). After a follow-up fax by the IAAF on 12 November 2001, the CAF informed the IAAF on 13 November 2001 that the case, including all the documentation, "has been handed over ... to [its] disciplinary commission for further negotiation," which was expected to conclude by 30 November 2001. (Fax from Frantisek Fojt to Dr. Gabriel Dolle). A 16 November 2001 fax repeated this assurance, stating that the commission will "conclude this case" by 30 November 2001.
11. The CAF again maintained its refusal to sanction Zubek. On 3 December 2001, the CAF sent the IAAF the minutes of the meeting of the Disciplinary Commission held on 26 November 2001. The minutes show that the Commission referred to its decision of November 20, 2000 and to the decision of May 14, 2001 and stated that according to

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- CAF's Disciplinary Regulations, it could not bring proceedings against Zubek, regardless of any new circumstances, more than one year after the alleged offense. It also noted that "the sample B has been mailed to the isotope control after more than 3 months after the realization of the taking off." (3 December 2001 Fax from Frantisek Fojt to Dr. Gabriel Dolle).
12. The IAAF responded to these objections in a subsequent letter, stating among other things that CAF was to apply IAAF regulations, not its own. The IAAF asked CAF to "now confirm that IAAF can treat the Disciplinary Commission's decision as final." The CAF responded by confirming in a 14 December 2001 letter that the decision of the Disciplinary Commission was final: "I am sorry, but it's my duty [to] hereby confirm, that the Disciplinary Commis[s]ion's decision in the case of Roman Zubek is final." (Fax from Frantisek Fojt to Dr. Gabriel Dolle).
 13. The IAAF filed this appeal, pursuant to IAAF Rule 21.3(ii), with CAS on 31 January 2002. The IAAF seeks a ruling that the CAF improperly failed to commence disciplinary proceedings against Zubek and that Zubek committed a doping offense meriting a two-year suspension.
 14. CAS appointed three arbitrators to hear the appeal: Prof. Christoph Vedder of Augsburg, Germany, nominated by the IAAF; Gerhardt Bubnik of Prague, Czech Republic, nominated by the CAF; and as President, David W. Rivkin of New York, NY, United States.
 15. The Tribunal received various submissions from the parties, including documents, witness statements, expert reports and briefs, and issued several procedural orders. The Tribunal held a hearing in Lausanne on 15 May 2002 and, as described below, issued an additional procedural order and received several post-hearing submissions from the parties.
- DECISION**
16. The Arbitral Tribunal must first decide if, on the facts of this case, the appeal was filed in a timely manner so that we have jurisdiction over the appeal and the parties before it. If the appeal is timely, then the Tribunal must decide whether Zubek committed a doping offence under the IAAF Rules.

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Jurisdiction

Timeliness of the IAAF Appeal

17. IAAF Rule 21.2, effective 1 November 2001, provides that all appeals to the Court of Arbitration for Sport be made "within sixty days of the date of communication to the prospective appellant of the decision that is to be referred." The Transitional Provisions of these rules state that disputes relating to any doping matter before 1 November 2001 shall be resolved in accordance with the prior IAAF Rules, unless the parties agree to submit their dispute to CAS.
18. Thus, CAS has jurisdiction over appeals in IAAF matters only where the challenged decision was taken later than 31 October 2001, unless the parties consent to CAS jurisdiction on an ad hoc basis, as provided in Note 3 of the Transitional Provisions. While the IAAF and CAF consented to the CAS's jurisdiction, Zubek neither consented nor objected to jurisdiction. Silence cannot be deemed to be consent for purposes of the Transitional Provisions. As a result, this Tribunal has jurisdiction only if the CAF decision from which the IAAF appeals was made later than 31 October 2001, so that we must decide whether the CAF's 26 November 2001 decision was a final decision from which the IAAF could appeal.
19. The CAF now contends that its Disciplinary Commission made its final decision on 20 November 2000 (reported to the IAAF on 12 December 2000). According to the CAF, the subsequent decisions of 27 February, 14 May, and 26 November 2001 merely restated the November 2000 decision in response to requests for reconsideration by the IAAF. Therefore, it argues that the IAAF's appeal brought on 31 January 2002 is untimely.
20. The IAAF contends that the CAF made a final decision on 26 November 2001 (reported to the IAAF on 3 December 2001). Therefore, it urges that its appeal is timely.
21. The Tribunal rules by a majority decision that the decision of 26 November 2001 was a final decision within the meaning of IAAF Rule 21.
22. Each of the earlier decisions made by CAF was incomplete in some manner. At the time of the 20 November 2000 decision, the CAF did not have the IRMS analysis but simultaneously claimed that the evidence was incomplete. When the IRMS analysis was presented, the CAF raised questions about the chain of custody of the sample used

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for the IRMS analysis in its February 2001 and May 2001 decisions, but it is not clear from the record that it had all of the chain of custody documentation at the time.

23. Following each of these earlier decisions, the IAAF promptly raised questions to the CAF and asked it to reconsider. The CAF could have responded in each instance that its decision was final or that there was no legal basis to reconsider a decision already made. The CAF did not do so. Instead, the CAF acknowledged the IAAF's request, considered the information or questions, and made a new decision confirming the absence of sanctions on Zubek. In the course of this correspondence, which is quoted above, the CAS gave to IAAF the objective impression that each of the decisions previously adopted would be subject to review and thus was not final. For example, as noted above, the CAF told the IAAF on 13 November 2001 that the case documentation had been turned over to the Disciplinary Commission "for further negotiation." Because the CAF is the IAAF's member federation, it is entitled to rely upon these statements.
24. In contrast, the CAF's 14 December 2001 response to the IAAF's request for reconsideration expressly declared the 26 November 2001 decision to be final: "I am sorry, but it's my duty [to] hereby confirm that the Disciplinary Commis[s]ion's decision in the case of Roman Zubek is final."
25. Moreover, the records of the CAF's decisions show that in each instance CAF and its competent bodies in fact reconsidered the case. Even though the CAF came to the same result as originally, it re-opened and reconsidered the case. Indeed, in most instances, it listed different reasons for its decision: absence of IRMS testing, then chain of custody, then various rules. Any activity or decision that goes beyond stating that the previous decision is final and therefore untouchable is a new decision. Only after the decision of 26 November 2001 did CAF state "sorry," the decision "is final."
26. Therefore, even if the earlier decisions could also be considered final decisions within the meaning of Rule 21 (and the May 17, 2001 letter used that language), the decision of 26 November 2001 constituted a final, appealable decision.
27. The Tribunal therefore finds by a majority decision that the IAAF's appeal of the 26 November 2001 decision, which was within 60 days of the communication of this decision by the CAF to the IAAF, was timely. Moreover, because the final decision being appealed occurred after 1 November 2001, Rule 21 of the IAAF Rules applies.

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28. Finally, the Tribunal notes the important policy issues involved in this decision. Acceptance of the CAF's argument would discourage cooperation between international federations and national associations. In this case, the IAAF worked to respect the CAF's decision-making process. Rather than bring appeals of the earlier decisions (which it could have done), the IAAF continued discussion with the CAF in the hope of making an appeal unnecessary. Acceptance of the CAF's argument would promote hasty and perhaps unnecessary appeals. Here, the IAAF proceeded deliberately in order to make sure that all relevant information was considered.
29. However, the IAAF must be careful not to let time limits in its own rules lapse. The IAAF has no authority to extend its own time periods. The time period for appeal of each of the earlier decisions, which was 6 months under the prior IAAF Rules, had lapsed. This Tribunal has jurisdiction now only because the CAF made an independent decision on 26 November 2001, which began a new time period under the new IAAF Rules.

Notice to Zubek

30. Zubek received notice of his provisional suspension on 30 August 2000; he was present at the 4 October 2000, 25 October 2000, and 20 November 2000 meetings of the CAF Disciplinary Commission.
31. Throughout the dispute, the IAAF corresponded with Zubek's national federation under the assumption that the CAF was forwarding the information to Zubek.
32. The CAF provided Zubek with his copy of the IAAF appeal when it was filed with CAS. Zubek chose never to respond to the IAAF or to enter any form of appearance. This failure to participate does not impact the proceedings.
33. At the hearing, the CAF stated that Zubek's coach had been aware of the hearing.
34. In a procedural order following the hearing, the Tribunal provided Zubek with the opportunity to comment on the evidence and arguments, as well as to produce new evidence and arguments, but Zubek never responded to this opportunity.

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35. The Tribunal therefore finds by a majority decision that Zubek received fair notice of the CAS proceedings. Because the Tribunal has jurisdiction over this appeal pursuant to Rule 21 of the IAAF Rules, the Tribunal's jurisdiction applies to Zubek as well. See Rules 21.2 and 21.6. The Tribunal notes that to find for Zubek on this issue might allow national federations to protect their athletes from international regulation simply by refusing to give notice of relevant correspondence, decisions, or CAS or other international proceedings against the athlete.
36. The Tribunal also notes that it is not clear how additional notice to Zubek would have altered the outcome of this case. The CAF provided vigorous opposition to the IAAF throughout this case in order to protect its decision failing to sanction Zubek. It raised the same arguments that Zubek appears to have raised at the CAF disciplinary proceedings, and when offered an opportunity to present additional evidence or arguments, Zubek chose not to do so. In short, given the conclusive results of two independent and procedurally sound tests, additional notice would not have changed the result. Therefore, even if Zubek's claim of procedural irregularity had more substance, this Tribunal would be justified in dismissing it. See Melinte/IAAF (Arbitration CAS ad hoc Division (O.G. Sydney) 2000/015) (finding no harm in the denial of an athlete's right to be heard where such a hearing would not have altered the CAS Panel's ruling); see also S./FINA (rejecting argument based on insufficient "opportunity to address the IRMS analysis" because "the outcome of this appeal would [not have been] different even if a different procedure had been followed.")

Merits

37. Because this case was referred to CAS by virtue of Rule 21.3(ii), rather than by virtue of Note 3 of the Transitional Provisions, IAAF Rules as in force of November 1, 2001 apply. A doping offence pursuant to Rule 55.2(i) takes place when "a prohibited substance is present within an athlete's body tissues or fluids." Pursuant to Rule 55.3, the prohibited substances are listed in Schedule 1 to the Procedural Guidelines for Doping Control (PGDC). Schedule 1, Part I, of the PGDC list DHEA as a prohibited substance.
38. The presence of DHEA may result from endogenous production. For this situation, Schedule 1 PGDC in its introductory part provides:

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“Where a Prohibited Substance (as listed below) is capable of being produced by the body naturally, a sample will be deemed to be positive for that substance where the concentration of the substance or its metabolites and/or the ratios in the athlete’s body tissues or fluids so exceeds the range of values normally found in humans so as not to be consistent with normal endogenous production.

A sample may not be regarded as positive for a Prohibited Substance in any such case where the athlete proves by clear and convincing evidence that the concentration of the substance or its metabolites and/or their ratios in the athlete’s body tissues or fluids is attributable to a pathological or physiological condition.

Evidence may be obtained from metabolic profiles and/or the measurement of isotopic ratios (isotope ratio mass spectrometry) to draw definite conclusions as to the exogenous origin of a Prohibited Substance or its metabolites.”

This general provision, which applies to all prohibited substances, was introduced by the 2002 edition of the PGDC. However, it simply codifies the state of the relevant law previously applicable. Therefore it is immaterial which edition of the PGDC apply.

39. The concentration of DHEA in Zubek’s “A” and “B” samples greatly exceeded the concentration that might result from endogenous production. These samples also show a far higher concentration of DHEA than his previous results.
40. Zubek and the CAF do not challenge the testing procedures utilized by the Prague laboratory.
41. The Prague laboratory’s standard procedures thus provide sufficient evidence of Zubek’s doping violation. Indeed, the Tribunal notes that Zubek himself implicitly consented to the sufficiency of this test by attempting to retract his earlier request for IRMS analysis.
42. IRMS analysis can differentiate between exogenous administration and endogenous production of DHEA. See UCI/S.. DCU and DIF (Arbitration CAS 98/192) (finding DHEA violation based on GC/IRMS analysis); see also S/FINA (Arbitration CAS 2000/A/274 (finding that IRMS analysis “provided(d) conclusive scientific evidence of an exogenous administration of the prohibited substance testosterone or one of its precursors.”))

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43. IRMS analysis of Zubek's samples revealed decreased isotope values of androsterone and etiocholanolone consistent with the exogenous administration of DHEA. The Director of the Cologne Laboratory found that "the *only* possible source of the levels of etiocholanolone and androsterone found in the athlete's sample is the application and administration of a Prohibited Substance." (emphasis added) (Witness Statement of Professor Wilhelm Schanzer)). An advisor to the IAAF Anti-Doping Commission concurred that the IRMS analysis "clearly indicates the 'synthetic' origin of the urinary metabolites androsterone and etiocholanolone. . . ."
44. The IRMS analysis therefore contradicts Zubek's endogenous production argument. In addition, the Tribunal notes that Zubek's only authority for this argument came from his coach, who lacks the objectivity and the scientific training to bring such a claim. Compare B.ITU (Arbitration CAS 98/222) (recognizing an endogenous production argument supported by "expert opinion" and providing a specific explanation for the test results)
45. The Cologne laboratory's test results therefore provide a second, independent proof of Zubek's doping violation.
46. Zubek has produced no evidence of chain of custody problems related to the Cologne testing to counter the evidence on record demonstrating compliance with chain of custody requirements. There is no requirement that an athlete or his representative be present at the sealing of a sample to be sent for IRMS analysis. See IAAF Rule 55.11, which provides that procedural departures shall not invalidate testing findings "unless this departure was such as to cast real doubt on the reliability of such a finding."
47. The Tribunal unanimously concludes that both tests individually provide sufficient evidence to find a doping violation. Therefore, even if Zubek's challenge to the second procedure had merit, it would be irrelevant. The tribunal also unanimously concludes that the original decision of the CAF not to sanction Zubek for the doping violation was wrong.
48. IAAF Rule 60.2(a)(i) provides that an athlete's first doping offense involving a Schedule I, Part I substance results in a period of ineligibility "for a minimum of two years from the date of the hearing at which it is decided that a Doping Offence has been committed." Where, as here, the athlete has already served a provisional suspension, the rule provides that "such a period of suspension shall be deducted from the period of

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DECISION

The Court of Arbitration for Sport rules:

1. Upholds the appeal filed by the IAAF on 31 January 2002.
2. Finds that tests of Roman Zubek's samples from the 13 May 2000 athletics meeting in Prague provide evidence of a doping violation.
3. Finds that the CAF failed to appropriately declare Roman Zubek ineligible.
4. Suspends Roman Zubek from competition for 21 months, 13 days (two years less the two months, seventeen days served under the provisional suspension) from the date of this decision; *i.e.*, until 10 May 2004.
5. Declares that the award is rendered without costs except for the Court Office fee of CHF 500.-- (five hundred Swiss francs) already paid by the Appellant and which is retained by the CAS.
6. Declares that each party shall bear its own costs.

Done in Lausanne, 27 August 2002

THE COURT OF ARBITRATION FOR SPORT



David Rivkin
President of the Panel

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ineligibility imposed by the relevant Tribunal.” Zubek served a provisional suspension from 3 September 2000 until 20 November 2000, a period of 78 days.

49. The decision as to the costs is based on Art. R 65 of the Code. The CAS Court Office of CHF 500.-, paid by the IAAF upon filing the statement of appeal, shall be kept by CAS (Art. R65.2 of the Code). Pursuant to Art. R65.3 of the Code, the Parties are required to advance their own costs as well as the costs of experts, witnesses and interpreters. It is then up to the Tribunal to decide which party is to bear the costs ultimately. In so deciding, the Tribunal must take into account the outcome of the proceedings, as well as the conduct and financial resources of the parties. Considering all the circumstances in the case, the Tribunal concludes that it is reasonable for both parties to bear their own costs and expenses incurred in connection with this appeal arbitration procedure.

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