



Arbitration CAS 2012/A/2859 Alexander Ruoff v. Vlaams Basketballiga v.z.w. (VBL), award of 12 September 2012 (operative part of 24 August 2012)

Panel: Mr Manfred Nan (The Netherlands), Sole Arbitrator

Basketball

Doping (4-Methyl-2-Hexanamine)

Starting date of the period of ineligibility

Substantial delay in the disciplinary proceedings

1. To assess specifically if there are substantial delays not attributable to the player, the judging body has to take into account the following circumstances: (i) the total duration of the disciplinary proceedings, starting from the date of sample collection till the date of notification of the decision by the disciplinary authorities; (ii) the lapse of time of each separate phase of the disciplinary proceedings; (iii) the complexity of the case, including the scope of the investigations; (iv) the way in which the competent authorities have dealt with the case, including the extent to which the competent authorities did proceed expeditiously and (v) the influence of the player on the course of the proceedings.
2. In general, a total duration of eight months in disciplinary proceedings with regard to an anti-doping violation does not constitute a substantial delay by itself. However, established multiple delays in separate phases of the judging process, such as the stay of the proceedings and the fact that the competent authorities could have proceeded in a more expeditious manner, whereas the case was not complex and the player did not cause any delays in the proceedings, constitute the substantiality of the delay.

I. PARTIES

1. The Appellant, Mr Alexander Ruoff (hereinafter also referred to as the “Player”), is a professional basketball player.
2. The Respondent, Vlaamse Basketballiga v.z.w. (hereinafter also referred to as the “VBL”) is an entity representing and organizing Flemish basketball in Belgium.

II. FACTUAL BACKGROUND

3. The background facts stated herein are a summary of the main relevant facts, as established on the basis of the parties' written submissions and of the evidence examined in the course of the proceedings. Additional facts will be set out, where material, in connection with the discussion of the parties' factual and legal submissions.
4. On 12 October 2011, the Player was selected for an in-competition anti-doping control on the occasion of the basketball game between the clubs of VOO Verviers-Pepinster and Generali Okapi Aalstar. The test was performed by the WADA-accredited Anti-Doping laboratory of Ghent. The urine sample provided by the Player revealed the presence of "4-Methyl-2-Hexanamine", which is a prohibited substance appearing on the Prohibited List attached to the International Convention Against Doping in Sport.
5. After the Player was notified by letter dated 28 October 2011 that his "A" Sample of 12 October 2011 had tested positive, he waived his right for an analysis of the "B" Sample.
6. On 12 December 2011, the "Vlaams Doping Tribunaal" (hereinafter referred to as "VDT") transmitted the file to the Prosecutor.
7. On 16 February 2012, the VDT transmitted the file to the President of the "Disciplinaire Commissie voor Elitesporters" (hereinafter referred to as "DCE").
8. On 13 March 2012, the Prosecutor drafted the accusation against the Player.
9. By letter dated 16 March 2012, the VDT informed the Player that a hearing was scheduled for 26 April 2012.
10. Due to the absence of the original test form at the hearing of 26 April 2012, the DCE decided to stay the proceedings till 7 June 2012.
11. On 28 June 2012, the DCE imposed a six months suspension to the Player, starting from "*the day of the judgement*" – 28 June 2012 –, and running until 27 December 2012, stating that – as relevant: "*There is no evidence that there have been substantial delays in the disciplinary proceedings or other aspects of the doping controls. There was no provisional suspension imposed on the athlete so that the length of the suspension cannot also be reduced by any amount. The fact that the athlete would not have played a single game since December 1, 2011 is not only not proven but also may not serve as grounds for the reduction of the period of suspension*".
12. By registered letter dated 2 July 2012, the DCE notified the Player about the decision of the DCE dated 28 June 2012.

III. CAS PROCEEDINGS

13. On 12 July 2012, the Player filed with CAS his statement of appeal against the decision of the DCE dated 28 June 2012 (hereinafter referred to as the “Decision”). The timeline of the appeal filed by the Player is undisputed.
14. On 20 July 2012, the Player filed his appeal brief together with the relevant exhibits.
15. On 8 August 2012, in accordance with Article R55 of the Code of Sports-related Arbitration (hereinafter referred to as the “CAS Code”) and the expedited calendar agreed upon by the parties, the Respondent filed its answer together with the relevant exhibits.
16. On 13 August 2012 a notice of formation of the Panel was sent to the parties. The Panel was composed of Mr Manfred Peter Nan, Arnhem, Netherlands, as Sole Arbitrator.
17. With the consent of both parties, the Sole Arbitrator decided, pursuant to Article R57 of the CAS Code, that it was not deemed necessary to hold a hearing and that he was sufficiently well informed to issue a decision on the basis of the written submissions.
18. On 22 August 2012, CAS issued an Order of Procedure. Both parties signed the Order of Procedure, inter alia confirming their agreement with an expedited calendar and confirming their agreement that the Sole Arbitrator may decide the matter based on the parties’ written submissions and that their right to be heard has been respected.

IV. SUMMARY OF THE PARTIES' POSITIONS

19. The following summaries of the parties’ positions are only illustrative and do not purport to include every contention put forward by the parties. However, the Sole Arbitrator has carefully considered all of the arguments advanced by the parties, even if there is no specific reference to those arguments in the following outline of their positions.

THE PLAYER’S SUBMISSIONS

20. The Player argues that the DCE wrongly decided not to apply Article 469bis, 4), §8, second part, 1^o of the Internal Regulations of the VBL (hereinafter referred to as “VBL Regulations”), which article is in the view of the Player an implementation of Article 10.9.1 of WADA’s 2009 World Anti-Doping Code as well as of the Internal Regulations of the FIBA, and provides for the possibility of bringing the commencement of the period of ineligibility forward in case of substantial delays in the hearing process or other aspects of doping control not attributable to the athlete.
21. The Player states that the DCE should have applied Article 469bis, 4), §8, second part, 1^o of

the VBL Regulations alleging there is a delay in the hearing process of 32 weeks, which is substantial, and not attributable to him on the following grounds:

- a) *There has been a delay in the translation of documents in preparation of the file (...);*
- b) *There has been a delay in the drafting of the accusation by the DCE's Prosecutor (...);*
- c) *There has been a delay in the scheduling of the hearing (...);*
- d) *There has been a delay in the handling of the case (...)*
- e) *There has been a delay in the declaration of the decision (...)*”.

22. In addition, the Player points out that he “*significantly accelerated the proceedings*” and that he did not participate in any official game with his club Generali Okapi Aalstar since 26 November 2011.

23. In light of the foregoing, the Player refers to CAS case law and decisions of the FIBA Disciplinary Panel, and requests “*CAS to retroactively start the period of ineligibility on:*

- a) *In principal: October 12, 2011, i.e. the date of sample collection (...);*
- b) *In the alternative: November 27, 2011, i.e. the day after the date of the last official game played by Appellant (...);*
- c) *In the second alternative: January 1, 2012 (...);*
- d) *In the third alternative: April 26, 2012, i.e. the date of the first hearing of Appellant by the VDT (...)*”.

24. Therefore, the Player requests the Sole Arbitrator to grant the following relief:

- “1. *partly set aside the decision rendered by the DCE of the VDT in case no 03/2011 on June 28, 2012 to the extent that the period of ineligibility of six (6) months started on the date of the hearing decision providing for ineligibility, i.e. on June 28, 2012;*
- 2. *Render an arbitral award, according to which:*
The period of ineligibility of six (6) months will retroactively commence on:
 - *In principal: October 12, 2011;*
 - *In the alternative: November 27, 2011;*
 - *In the second alternative: January 1, 2012;*
 - *In the third alternative: April 26, 2012;*
- 3. *Respondent is liable to reimburse Appellant the CAS Court Office fee of one thousand Swiss francs (...);*
- 4. *Respondent is liable to indemnify Claimant for incurred legal expenses (including attorney's fees) up to an amount to be determined in the course of the CAS proceedings*”.

VBL'S SUBMISSIONS

25. The VBL states that the DCE applied Article 469 bis, 4) §8, second part, 1° of the VBL Regulations in a manner prescribed by this rule. The VBL points out that the DCE rendered its decision 8 months after the doping control and argues that a term of 8 months should not be considered a substantial delay. The VBL refers in this respect to CAS case law.
26. In continuation, the VBL submits that no other exceptions as provided in Article 469 bis, 4) §8, second part of the VBL Regulations is applicable. The VBL argues that *“the Appellant did not promptly admit the doping practice after having been confronted with it by the VDT (...), nor was a Provisional Suspension imposed and respected by the Appellant (...), finally, the Appellant never voluntarily accepted a provisional suspension”*.
27. The VBL argues that *“the fact that the Appellant did not play an official match ever since November 27, 2011”*, is caused by an injury, and can't be taken into account, because no (voluntary) provisional suspension has been accepted by or inflicted on the Player. The VBL refers to Article 469 bis, 4) §8, second part, 5° of the VBL Regulations.
28. Furthermore, the VBL submits that if the starting date of the period of ineligibility *“would be advanced to November 27, 2011, the Appellant would in reality not have undergone any ineligibility sanction at all”*.
29. In conclusion, the VBL submits the following plea for relief:
“The Respondent respectfully requests the Sole Arbitrator:
 1. *To dismiss the appeal of the Appellant*
 2. *To confirm the decision rendered by the DCE of the VDT in case no. 03/2011 on June 28, 2012*
 3. *To order the Appellant to bear all costs of this arbitration*
 4. *To order the Appellant to contribute to the Respondent's legal fees and other expenses in connection with the proceedings in an amount to be determined by the Sole Arbitrator of the CAS”*.

V. JURISDICTION

30. The jurisdiction of the CAS, which is not disputed, derives from Article 496 bis 6) of the VBL Regulations and Article R47 of the CAS Code.
31. Moreover, the parties confirmed the jurisdiction of the CAS by signing the Order of Procedure.
32. It follows that the CAS has jurisdiction to decide this dispute.

VI. APPLICABLE LAW

33. Article R58 of the CAS Code reads as follows:

“The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.

34. Such provision was expressly mentioned in the Order of Procedure agreed to by the parties.

35. No issue of applicable law arose in the present case and the VBL Regulations shall be applicable.

36. Pursuant to Article R57 of the CAS Code, the Sole Arbitrator has *“full power to review the facts and the law”*. As repeatedly stated in CAS case-law, this means that the CAS appellate arbitration procedure entails a de novo review that it is not confined to deciding whether the body that issued the appealed ruling was correct or not.

VII. MERITS

37. Based on the parties’ submissions, the Player does not contest the anti-doping rule violation or the duration of the sanction imposed by the DCE. The Sole Arbitrator notes that the issue for determination is the starting date of the period of ineligibility of six months.

A) STARTING DATE OF THE PERIOD OF INELIGIBILITY

38. As to the commencement of the ineligibility period, the Sole Arbitrator takes notice of the principle set forth by Article 469 bis, 4) §8, first part of the VBL Regulations.

39. The original text of Article 469 bis, 4) §8, first part of the VBL Regulations – which content is not disputed by the parties, but is not translated in the file – reads as follows (as relevant):

“De uitsluitingsperiode gaat in op de dag waarop tijdens een hoorzitting een uitsluiting wordt opgelegd (...). Elke periode van voorlopige schorsing moet worden afgetrokken van de totale periode van uitsluiting die wordt opgelegd”.

40. The Sole Arbitrator notes that this principle provides that:

- a. The period of ineligibility starts on the date of the decision providing for ineligibility;
- b. Any period of provisional suspension shall be credited against the total period of ineligibility imposed.

41. In continuation, the Sole Arbitrator acknowledges that it is undisputed that the decision of the DCE is dated 28 June 2012 and that no provisional suspension was imposed on the Player. Based on the principle as defined in Article 469 bis, 4) §8, first part of the VBL Regulations, the period of ineligibility of six months should start on 28 June 2012.
42. However, the Sole Arbitrator observes that Article 469 bis, 4) §8, second part of the VBL Regulations contains exceptions to the mentioned principle.
43. In continuation, the Sole Arbitrator notes that the Player only invokes the exception provided in Article 469 bis 4), §8, second part, 1° of the VBL Regulations, which provision reads as follows:
“This rule does not apply in the following cases:
 1. *When the disciplinary procedure or other aspects of the doping control suffer substantial delays that are not attributable to the athlete or mentor, the disciplinary organ may start the period of ineligibility at an earlier date, commencing at the earliest at the date of sample collection or at the date on which another doping practise last occurred”.*
44. To assess specifically if there are substantial delays not attributable to the Player, the Sole Arbitrator has to take into account the following circumstances:
 - a) the total duration of the disciplinary proceedings, starting from the date of sample collection till the date of notification of the decision by the disciplinary authorities;
 - b) the lapse of time of each separate phase of the disciplinary proceedings;
 - c) the complexity of the case, including the scope of the investigations;
 - d) the way in which the competent authorities have dealt with the case, including the extent to which the competent authorities did proceed expeditiously;
 - e) the influence of the Player on the course of the proceedings.
45. The Sole Arbitrator observes that in general a total duration of 8 months in disciplinary proceedings with regard to an anti-doping violation does not constitute a substantial delay by itself.
46. However, the Sole Arbitrator is of the opinion that there are multiple delays in separate phases of the proceedings, which constitute the substantiality of the delay.
47. The Sole Arbitrator refers primarily to the decision of the DCE to stay the proceedings for 6 weeks because the original test form was not available at the hearing on 26 April 2012.
48. Furthermore, the Sole Arbitrator observes that although the case was not complex and the Player did not cause any delays in the proceedings, the VDT could have proceeded in a more expeditious manner, considering the time used for the translation of documents, the drafting of the accusation by the Prosecutor and the scheduling of the hearing.

49. Due to the established delays in the judging process, not attributable to the Player (he was not able to influence the stay of the proceedings, nor the way in which the competent authorities have dealt with the case), the Sole Arbitrator deems fair to apply the mentioned principle set forth by Article 469 bis 4), §8, second part, 1° of the VBL Regulations and, thus, to start the period of suspension at an earlier date than 28 June 2012 (the day of the judgement by the DCE).
50. It should be noted here, that the *de facto* period of ineligibility of the Player because he did not participate in any official game since 26 November 2011 cannot be taken into account as a credit. The Sole Arbitrator observes that the Player did not give any reason for his non participation since 27 November 2011. Furthermore, the Sole Arbitrator establishes that the non participation of the Player does not rely on a provisional suspension, nor did the Player prove that he voluntarily accepted a provisional suspension. Pursuant to Article 469 bis, 4) §8, second part, 5° of the VBL Regulations *“no credit against a period of ineligibility shall be given for any time period before the effective date of a provisional suspension regardless of whether the athlete chose not to participate to competitions or was suspended by his or her team”*.

B) CONCLUSION

51. Accordingly, the Sole Arbitrator holds that, in view of all the circumstances of the case, the six months period of suspension must start on 26 April 2012, which is the date of the first assigned hearing in the VBL Internal proceedings.
52. The above conclusion is not refuted by the case law invoked by the parties, which refers to different cases.
53. The above conclusion, finally, makes it unnecessary for the Sole Arbitrator to consider the other requests submitted by the parties to the Sole Arbitrator. Accordingly, all other prayers for relief are rejected.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Alexander Ruoff on 12 July 2012 against the decision of the “Disciplinaire Commissie voor Elitesporters” dated 28 June 2012 is partially upheld.
 2. The decision of the “Disciplinaire Commissie voor Elitesporters” of the “Vlaams Doping Tribunaal” dated 28 June 2012 is set aside only with respect to the starting point of the period of ineligibility imposed on Mr Alexander Ruoff.
 3. The six-month period of ineligibility imposed on Mr Alexander Ruoff shall start on 26 April 2012.
- (...)
6. All other and further claims or prayers for relief are dismissed.