Arbitration CAS 2010/A/2226, Carlos Manuel Brito Leal Queiroz v. Autoridade Antidopagem de Portugal (ADoP), award of 23 March 2011

Panel: Mr. Martin Schimke (Germany), President; Mr. Michele Bernasconi (Switzerland); Prof. Richard H. McLaren (Canada).

Football
Disciplinary sanction of a coach
Possibility of national anti-doping organisations to create provisions in addition to the WADA Code
Inappropriate behaviour and disturbance of the sample collection process

1. **Article 23.2.2 of the World Anti-doping Code does not prevent an anti-doping organization from creating additional provisions within its anti-doping rules. What Article 23.2.2 World Anti-doping Code does prohibit anti-doping organizations from doing is adding provisions which change the effect of the compulsory parts of the World Anti-doping Code.**

2. **The presence of an anti-doping officer early in the morning on a rest day does not excuse inappropriate and offensive comments on his regard; however, even if such behaviour is unacceptable, it does not automatically mean that the sample collection process was disturbed by such behaviour, especially if the incident did not happen during the "sample collection" and the athletes themselves were not in the vicinity of the incident (and thus the incident did not directly involve them). "Sample collection" describes merely a certain part of the whole process of "doping control".**

The Appellant, Mr. Carlos Queiroz ("Mr. Queiroz") is a Portuguese football coach. At the time of the facts which are the subject matter of this dispute, Mr. Queiroz was the coach of the Portuguese National Football Team (the "National Team").

The Respondent, the Autoridade Antidopagem de Portugal (ADoP) is the national anti-doping body in Portugal. ADoP is the entity responsible for all anti-doping matters in Portugal.

Mr. Queiroz is appealing a 30 August 2010 decision of the ADoP imposing a six month sanction of ineligibility upon him for an alleged violation of Article 3(2)(e) of the Portuguese Law n. 27/2009 of 19 June 2009 ("Law 27/2009").

In mid May 2010, the National Team was involved in a World Cup training camp in Covilha, Portugal. The team members were staying at the Hotel Serra de Estrela (the "Hotel").

On the morning of 16 May 2010, three anti-doping officers (ADOs) of ADoP arrived at the Hotel to perform an unscheduled, no advance notice anti-doping control on some of the National Team players. At the time of their arrival, Mr. Queiroz was having breakfast. The players were presumably still asleep in their rooms for they had been working hard the previous day and had been given an extended sleep-in that morning.

At some point following the arrival of the ADOs (but before they had reached the room in which they were to perform the anti doping control), the ADOs were approached by Mr. Queiroz. Before the ADOs and Mr. Queiroz parted ways, and the ADOs continued on to conduct the anti-doping control, Mr. Queiroz uttered some very distasteful and sexually descriptive comments. According to all the witness statements provided, these comments were not uttered at the ADOs and were made as he was walking away.

Following this interaction with the ADOs, Mr. Queiroz left to return to the breakfast room and the ADOs continued on to the room in which the anti-doping control was to be carried out.

On 20 May 2010, it was observed that one of the ADOs, Dr. M., failed to record the urine density for one of the samples taken on 16 May 2010[1]. Dr. Horta, in his role as President of ADoP, subsequently reprimanded Dr. M. for that failure. A few days after this reprimand, Dr. Horta requested that the two other ADOs (Dr B. and Dr. S.) file supplementary reports. It is unclear why this was done, although the Appellant speculates that it must have been as a result of Dr. Horta's review of an Annex which accompanied or followed the Doping Control Report (DCR) of 16 May 2010[2].

On 18 June 2010, Dr. B. and Dr. S. sent Dr. Horta separate emails attaching their own supplementary reports. The supplementary reports were dated 16 May 2010 and both indicated that Mr. Queiroz did not act in a welcoming fashion and used very inappropriate and/or offensive language.

On 2 July 2010, the Instituto de Deporte de Portugal (IDP) opened an inquiry into the 16 May 2010 incident. The three ADOs were questioned by the Head of IDP's legal department. All three ADOs advised that Mr. Queiroz' comments did not undermine the anti-doping control procedure, but that they did disturb their work[3].

On 23 July 2010, the President of the Portuguese Football Federation (PFF) received a copy of the inquiry and documentation relating thereto from IDP. PFF subsequently opened disciplinary proceedings (conducted by PFF's Disciplinary Council). The PFF Disciplinary Council heard evidence from 13 people and on 19 August 2010, rendered a decision acquitting Mr. Queiroz of an

[1] That error did not affect the integrity of the sample or the subsequent analysis conducted upon them.
[2] The Doping Control Report (DCR) was signed by all three ADOs. All items concerning the evaluation of the doping control session were qualified as "good" without any reference to any incident. In the field entitled "Observations", there is a handwritten statement referring to an "Annex". Strangely, this field also contains a slash through it. The Appellant alluded to the fact that this gave rise to some suspicion as to the authenticity (or the actual time of creation) of the Annex. The Annex is dated 16 May 2010.
[3] The Panel takes note of the fact that this was the first time any reference is made to the fact that the comments disturbed the work of the ADOs in any way.

anti-doping rule violation, but nevertheless sanctioning him with a 30-day suspension from all sports-related activities, for conduct that was considered unbecoming of the sport.

On 30 August 2010, the President of IDP issued a decision which: revoked the PFF Disciplinary Council decision, found the Appellant guilty of an anti-doping rule violation for breaching Article 3(2)(e) of Law 27/2009[4]; and suspended the Appellant for a period of six months from all sports activities.

It is this decision that is the subject of the appeal before this Panel.

At this stage the Panel would like to highlight that there is some discrepancy regarding the correct translation of Article 3(2)(e) of Law 27/2009. In its Appeal Brief at p. 3, the Appellant argues the relevant Article stipulates that *"obstruction, unjustified delay, occultation and all further conducts which, by an act or omission, hinder or disturb the collection of samples within the scope of anti-doping control"* constitute an anti-doping rule violation (while a subtly different translation is contained in the Appellant's exhibit CQ-2). The Respondent, in exhibit 15 to its Answer, however, translates Article 3(2)(e) as follows: *"Obstructing, unwarrantedly delaying, concealing and engaging in any conduct which, by act or omission, prevents or disturbs sample collection during doping control"*. In any event, the Panel notes that the parties are in agreement that, in the present case, the Appellant's conduct must have "disturbed the sample collection" for him to be guilty of an anti doping offence.

The Appellant filed his Statement of Appeal with the Court of Arbitration for Sport (CAS) on 13 September 2010.

Upon the Appellant's request, and with the Respondent's agreement, on 1 October 2010 the CAS Court Office granted a one week extension to the time limit for the filing of the Appeal Brief. Thereafter, on 11 October 2010, the Appellant filed his Appeal Brief, with exhibits and witness statements in accordance with Article R51 of the Code of Sports-related Arbitration (2010 edition) (the "CAS Code"). In his Appeal Brief the Appellant requests the Panel issue an arbitral award:

1. *Setting aside the Decision under appeal;*
2. *Holding that Mr. Queiroz has not committed any anti-doping rule violation; and*
3. *Ordering ADoP to reimburse Mr. Queiroz' costs.*

Upon the Respondent's request, and with the Appellant's agreement, on 2 November 2010 the CAS Court Office granted an extension to the time limit for the filing of the Answer until 12 November 2010. Thereafter, on 12 November 2010, the Respondent filed its Answer, exhibits and witness statements in accordance with Article R55 of the CAS Code. In its Answer, ADoP requests the CAS rule that:

1. *The Appeal filed by Mr Carlos Manuel Brito Leal Queiroz against the ADoP decision (NO. 8/DISC-10/11), dated 30 August 2010, is dismissed; consequently the Appellant shall serve any remaining part of the period of ineligibility resulting from the ADoP decision which he has not yet served.*

[4] Under law 27/2009, ADoP has the power to revoke the decisions of sports federation and issue a new decision.

2. ADoP is granted an award for costs.

A hearing took place in Lausanne, Switzerland, at the head offices of the CAS on 19 January 2011.

LAW

Applicable law and jurisdiction

1. Pursuant to Article R58 of the CAS Code:

   The Panel shall decide this 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.

2. Mr. Queiroz was charged for an anti-doping rule violation under Portuguese law. Accordingly, this dispute shall be decided in accordance with Portuguese Law.

3. The parties agree that the Panel has jurisdiction to hear this matter.

Legal issues

4. There are basically two issues before this Panel:

   A. Which law is applicable to the merits, i.e. is it Law 27/2009 or the 1998 version of the PFF Anti Doping Regulations?; and

   B. Whether Mr Queiroz' behaviour intentionally or negligently disturbed the sample collection, both from a factual and a legal standpoint.

5. In making its decision, the Panel has considered all the evidence and arguments presented to it, even if not expressly referred to or reproduced in this Award.

A. Applicable Law

6. The Panel is rather of the view that Law 27/2009 can be considered to be applicable to the merits of the case. In this regard, the Panel considered the fact that Law 27/2009 was in effect at the time of the alleged offence, albeit it had not yet been implemented by PFF. The Panel notes that Article 12 of Law 27/2009 requires sporting federations to adapt their doping control regulations to comply with the rules set out in the Law (i.e. they are to become anti-doping rules of the individual sport, but they are also national law). As such, had PFF adopted Law 27/2009 at the time of the alleged offence, it could have prosecuted the Appellant

presumably under its own regulations. As PFF had not implemented Law 27/2009 at the time of the alleged offence, the Appellant was prosecuted and charged under that national law. Law 27/2009 gives sporting federations and ADoP the authority to prosecute its violation.

7. The Panel notes that it is not entirely persuaded by the Appellant's argument that it is a precondition that for Law 27/2009 to be in effect, it had to be implemented by PFF at the time of the alleged offence. The Panel notes these seem to be two different matters. Law 27/2009 is not a law providing what sporting federations must have as anti-doping rules, it *is* the anti-doping rules, and part of the Law is that sport federations should make sure their own rules comply with its terms.

8. However, for reasons set out below, the Panel does not find it necessary to make a formal decision as to the applicable anti-doping law. In reaching its decision, the Panel considered the fact that, were the 1998 version of the PFF Anti Doping Regulations applicable, the Appellant could not be found guilty of an anti-doping offence, as the offence of "disturbing the sample collection" simply didn't exist. Moreover, as will be detailed below, even if Law 27/2009 applies, the Appellant's conduct cannot be deemed to have disturbed the sample collection. As a result, the question of which version of the law is applicable does not need to be decided in this proceeding for it is the Panel's conclusion that there could be no violation under either law.

B. Disturbance

9. The Appellant's argument that Article 23.2.2 of the World Anti-Doping Code (WADA Code) precludes an anti-doping organization from adopting additional anti-doping rule violations is not accepted. The Panel is of the view that nothing in Article 23.2.2 of the WADA Code prevents an anti-doping organization from creating additional provisions within its anti-doping rules. What Article 23.2.2 WADA Code does prohibit anti-doping organizations from doing is adding provisions which change the effect of the compulsory parts of the WADA Code. It is doubtful that Article 3(2)(e) of Law 27/2009 changes the effect of mandatory provisions of the WADA Code, rather it seems to simply amplify a provision which is included in the WADA Code.

10. For reasons set out below, the Panel does not find it necessary to make a formal decision as to the consistency of Article 3(2)(e) of Law 27/2009 with Article 23.2.2 of the WADA Code.

11. The Panel accepts that Mr. Queiroz' comments were both inappropriate and offensive. In fact, Mr. Queiroz himself does not dispute this.

12. The presence of the ADOs early in the morning on a rest day does not excuse his reaction, no matter the level of frustration Mr. Queiroz felt about it. While the Panel finds his behaviour most unacceptable, for the reasons that follow, it does not find that it disturbed the sample collection process.

13. Importantly, the Panel is of the view that the incident with Mr. Queiroz and the ADOs did not happen during the "sample collection". "Sample collection" is not specifically defined in Law 27/2009. However, it does form a part of the definition of "Testing" in Law 27/2009:

the stage in the doping control process involving test distribution, planning, ***sample collection****, sample handling, and sample transport to the laboratory.*

14. Furthermore, "doping control" is defined in Article 2(d) of Law 27/2009 as *"the process including all the acts and formalities, from the test planning and distribution until the final decision, in particular, information on athletes whereabouts,* ***sample collection*** *and handling, laboratory analysis …".*

15. In order to get a better understanding of the concept of "sample collection" itself, the Panel also undertook a detailed analysis of the World Anti Doping Code International Standard for Testing (2009 version) (the "International Standard") which, at page 21, defines "Sample Collection Session" as *"All of the sequential activities that directly involve the Athlete from notification until the Athlete leaves the Doping Control Station after having provided his/her Sample/s".*

16. In the present case, irrespective of who called the players to notify them, and when the players were called, it is undisputed that the players were not in the vicinity of the incident (and thus the incident did not "directly involve" any of the players pursuant to the definition of Sample Collection Session in the International Standard noted above). Looking at the matter from a different angle, the Panel notes that the International Standard sets out the initial and intermediary stages of the doping control process in the following order: Planning; Notification of Athletes; Preparing for the Sample Collection Session; and Conducting the Sample Collection Session. It thus seems clear to the Panel that a stage exists between Notification of Athletes and Conducting the Sample Collection Session (namely Preparing for the Sample Collection Session).

17. Taking into account all of the above noted definitions, it becomes clear that "sample collection" describes merely a certain part of the whole process of "doping control" and also that the incident with the Appellant did not occur during the sample collection.

18. The Panel concedes, however, that it is possible that a course of behaviour engaged in just prior to the sample collection could disturb the sample collection. In particular, the Panel notes Dr. Horta's testimony that the oldest method of disturbance is to create a hostile environment in which the sample collection process is taking place.

19. Taking Dr. Horta's testimony into account, the Panel nevertheless finds that the Respondent has failed to prove that Mr. Queiroz' behaviour disturbed the sample collection process. The Panel is of the view that there is simply no contemporaneous evidence of this. Moreover, the testimony of the Respondent's witnesses was unreliable in some aspects, and from time to time in conflict with prior witness statements.

20. Examples of such inconsistencies include, but are not limited to:

Dr. C.:

- in his witness statement, he commented that the Appellant was *"verbally aggressive towards the DCOs"*. However, at the hearing, he stated that Mr. Queiroz was aggressive, but not towards the ADOs; and
- did not confirm his witness statement at the hearing.

Dr. J.:

- in his witness statement, he states that Mr. Queiroz was *"certainly aggressive towards the three DCOs"*. In contrast, at the hearing, Dr. J. would not confirm that the behaviour was aggressive, but rather stated that the coach was agitated and upset, and speaking a little louder than usual.

Dr. B.:

- admitted in the hearing that he might have been a *"little excessive"* in his witness statement when he said things were so tense that they just wanted to just get out of there.

Dr. M.:

- in his first witness statement stated that when they first arrived at the Hotel, Mr. Queiroz and the ADOs greeted each other and exchanged pleasantries, while in his second witness statement he said that Mr. Queiroz *"began immediately to be verbally aggressive"* towards the ADOs.

21. Furthermore, the Panel takes notice of the fact that the ADOs were extremely experienced, and had been performing sample collections for over 20 years. In the absence of any explicit and reliable evidence of disturbance, the Panel is reluctant to imply their disturbance as a result of the Appellant's behaviour.

22. In any event, even if the Appellant's conduct could be deemed to have disturbed sample collection, the parties both agree that the Appellant must have either intended or been negligent as to the consequence of his behaviour. The Panel does not find that Mr. Queiroz' behaviour was intended to disturb the doping control. Indeed, no evidence has been tabled to this effect. Rather, there is evidence that the Appellant has made his rude remarks as a result of frustration and anger, possibly even pride, but not as a direct aggression against the ADOs. To conclude, the Panel is satisfied that the behaviour of the Appellant had no discernable effect upon the doping control procedure and, therefore, it is not a behaviour that can be the subject of sanctions under Law 27/2009, even assuming this law is applicable, nor of sanctions under the prior Portuguese anti-doping law.

23. For all of the foregoing reasons, after due consideration of all arguments submitted by the parties, the Panel finds that the Appeal must be upheld.

24. Regarding the other prayers for relief and further requests submitted by the parties, the Panel is of the view that the above conclusion, finally, makes it unnecessary for the Panel to consider such other requests. Accordingly, all other prayers for relief are rejected.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Carlos Queiroz against the decision issued by the Autoridade Antidopagem de Portugal on 30 August 2010 is upheld and the decision is set aside.

2. (…).

3. (…).

4. All other motions or prayers for relief are dismissed.