Arbitration CAS 2003/A/455 W. v/ UK Athletics, award of 21 August 2003

Panel: Ulrich Haas (Germany), President; Ian Blackshaw (United Kingdom); James Robert Reid (United Kingdom)

Athletics
Doping (testosterone)
Right to a fair hearing
Equal treatment
Sanction in case of multiple doping offences

1. **Not every cause justifies the postponement of a hearing, rather the cause must in any event be a "just" cause. A hearing date requires extensive preparation and usually requires a great number of people to be present. The fact that one party says it will not attend the hearing does not in itself constitute just cause. Instead, just cause requires that a party cannot attend for *no fault of his own*.**

2. **Whether an offence constitutes a *first* offence or whether it constitutes a *second* offence is matter for debate. Common usage of language would suggest that one must look at the chronological sequence of the offences. Pursuant to the Doping Rules and Procedures of UK Athletics, a doping offence is deemed to have been committed when "*a prohibited substance is found to be present within an athlete's body tissue or fluids*". The decisive factor is therefore the date when the prohibited substance was found in the athlete's body. That is either the date when the A sample was analysed or the date of the taking of the sample. It is not the date of the hearing.**

On 28 April 2002 a urine sample (ATN 28405, "the April Sample") was collected from the Appellant W. in an out-of-competition test by UK Sport. The analysis of the A sample at the Drug Control Centre at King's College London (DCC) showed an abnormal proportion of testosterone to epitestosterone ("T/E-ratio"). The result of the analysis was reported to UK Athletics Ltd (the Respondent) on 20 May 2002. The Respondent informed the Appellant of the positive test result by letter dated 21 May 2002.

On 21 May 2002,a further urine sample (ATN 28503) was collected from the Appellant ("the May Sample"). This sample was also analysed by the DCC. The laboratory detected the substance 17-epimethandienone in the sample. The DCC informed the Respondent of the positive test result by letter dated 31 May 2002. The Appellant was informed of the positive test result on 5 June 2002. All of the documentation was submitted to the Drug Advisory Officer

(DAO) on 6 June 2002 who decided that there was prima facie evidence of a doping offence. The Respondent advised the Appellant of this decision by letter dated 11 June 2002. The B sample was then analysed on 19 June 2002. The analysis confirmed the findings of the A sample. The Appellant was advised of this by letter dated 24 June 2002. In a supplementary analytical report the DCC informed the Respondent that the smallest ratio of testosterone to epitestosterone measured in the May Sample was 21:1. The May Sample was put to a disciplinary hearing in London on 17 July 2002 in the offices of the Respondent's solicitors. The decision by the Respondent's Disciplinary Committee was handed down on 18 July 2002. The Disciplinary Committee found the Appellant guilty of a doping offence and imposed a two-year period of ineligibility ending on 11 June 2004.

By letter dated 26 May 2002 the Appellant requested that the B sample of the April Sample be tested. The result of that analysis again showed an abnormally high T/E ratio. The Appellant was informed of the positive test result of the B sample by the Respondent by letter dated 27 June 2002. On 19 July 2002 the Respondent received the decision of the DAO that there was prima facie evidence of a doping offence in respect of the April Sample. The Respondent informed the Appellant of this decision by letter dated 22 July 2002.

The Respondent sought guidance from the IAAF as to whether to treat the April Sample and May Sample as two separate doping offences. The Respondent informed the Appellant of this on multiple occasions (2 July 2002, 22 July 2002, 10 September 2002 and 3 October 2002). On 24 October 2002 the IAAF informed the Respondent that it would not oppose any action by the Respondent to treat the findings of the April Sample and the May Sample as two separate offences. On 28 October 2002 the Respondent informed the Appellant of, inter alia, the IAAF's viewpoint and of the need to hold a hearing.

The April Sample was put to a disciplinary hearing in the offices of the Respondent's solicitors on 11 February 2003. By letter dated 30 January the Respondent's solicitors advised the Appellant, inter alia, that "*in your absence, the Committee will not be able to ask you any questions and will be entitled to come to a decision on the basis of the evidence presented to it*." The Appellant did not appear at the hearing nor was he represented by his coach or any legal representative, although he had indicated he would be represented.

The Disciplinary Committee handed down its decision in respect of the April Sample on 11 February 2003. The Disciplinary Committee found the Appellant guilty of a doping offence under paragraph 5(a) of the Respondent's Doping Rules and Procedures.

Following the hearing held on 11 February 2003 the Respondent advised the Appellant by letter dated 12 February 2003 that the Appellant had been found guilty by the Disciplinary Committee of a second doping offence. Furthermore, in this letter the Respondent "declared" the Appellant ineligible to compete in athletics events within the UK and abroad, for life in accordance with Rule 29 (g) (ii) of the Respondent's Doping Rules and Procedures. The written decision of the Disciplinary Committee was forwarded to the Appellant by the Respondent on 25 February 2003, 4 March 2003 and again on 3 April 2003.

On 16 April 2003 the Appellant lodged a Statement of Appeal requesting relief from the Respondent's decision dated 21 February 2003.

The hearing took place in London on 28 July 2003.

In his Statement of Appeal dated 16 April 2003 the Appellant makes a request "*to appeal [his] case to the Court of Arbitration for Sport*". At the hearing the Appellant, with the Respondent's agreement, specified his request in more detail, namely that

- the decision of the Respondent's Disciplinary Committee dated 11 February 2003 (the grounds of which were given on 21 February 2003) and
- the decision of the Respondent dated 12 February 2003 in which the Appellant is declared ineligible to compete in athletics events within the UK and abroad for life

be declared void and be set aside.

In support of his request the Appellant contends – inter alia – that

a) the hearing was not made available at a suitable date or venue,

b) the Appellant was not treated by the Respondent in a consistent manner compared to other athletes

c) the May Sample and the April Sample should have been treated as a single case and not as two separate cases

d) the Respondent issued a press release divulging confidential and incorrect details of his case and

e) throughout the case no proper effort was made to keep him informed of matters that had arisen.

The Respondent requests that the Appellant's complaint be dismissed. In support of its request the Respondent contends – inter alia – that

a) the issue of what venue is appropriate for a disciplinary hearing and the issue of whether or not to allow an adjournment are for the discretion of the Disciplinary Committee. In exercising its discretion the Disciplinary Committee has not breached the applicable rules nor committed a procedural unfairness as a matter of English law

b) the allegation of inconsistency of treatment is misconceived since the cases cited by the Appellant show significant differences

c) the press release is no proper basis for impugning the decision itself and that the Respondent published the result of the Disciplinary Committee hearing fairly and accurately

d) the complaint that the Respondent did not keep the Appellant informed was too vague and general and obviously untrue.

LAW

1. The Appellant filed his appeal under art. R47 of the Code of Sports-related Arbitration (the Code). Art. R47 of the Code requires either a provision in the statutes or regulations of the respective sports body or a specific arbitration agreement between the parties. The Appellant must, however, first exhaust the legal remedies available to him under the statutes or regulations of the said sports body prior to filing an appeal with the CAS.

2. The Appellant has – undeniably – subjected himself to the Respondent's rules (Doping Rules and Procedures), which in turn contain an arbitration clause or rather a reference to such a clause. Rule 3 Doping Rules and Procedures provides that "*all athletes who wish to compete under UKA´s and the IAAF´s Rules agree, by so competing, that they understand and accept the rules, processes and sanctions relating to anti-doping of both UKA and the IAAF*." Rule 21 of the IAAF's rules expressly refers to the jurisdiction of the CAS. Furthermore, Rule 28 Doping Rules and Procedures refers to this provision in the IAAF's rules. It literally states: "*Athletes are also reminded that the IAAF´s Rules relating to disputes (IAAF Rule 21) hereby apply to athletes and those Rules set out circumstances in which disputes or matters may be referred to the Court of Arbitration in Lausanne*." Finally, both parties signed the Order of Procedure of 16 June 2003 and thereby expressly declared the CAS to be competent to resolve the dispute. They also did not raise any objections to the jurisdiction of the CAS during the entire proceedings.

3. Pursuant to art. R58 of the Code, the "Panel shall decide the dispute according to the applicable regulations of the Respondent 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 body which has issued the challenged decision is domiciled." The Respondent is a national federation belonging to the IAAF and has its registered office in London, Great Britain. Since the parties have not chosen the rules of law of a specific country, pursuant to art. R58 of the Code, any aspects of the dispute which are not governed by the relevant rules of the Respondent shall be decided according to English law.

4. With the present request the Appellant is appealing against the decision of the Disciplinary Committee dated 11 February 2003 and the Respondent's decision of 12 February 2003, whereby the Respondent - applying Rules 27 and 29 (g) (ii) - imposed a lifelong ban on the Appellant.

5. The Appellant's Statement of Appeal and Appeal Brief do not advance any criticism of the substance of this decision. He does not challenge the Disciplinary Committee's findings that the Respondent carried out a proper doping procedure; that there was a proper chain of custody to the IOC Accredited Laboratory; that the testing procedures were appropriate; that the results of the tests established an abnormally high ratio of testosterone to epitestosterone; that there was no endogenous explanation for this; and

that a doping offence was therefore disclosed. Also in the hearing, the Appellant confined his submissions to the arguments put forward in the Statement of Appeal and the Appeal Brief. In the Panel's opinion, the grounds stated by the Appellant do not justify the decision of the Disciplinary Committee being set aside.

6. Contrary to the Appellant's opinion the hearing upon which the decision was based was reasonable both in terms of its timing and in terms of its venue.

7. The Appellant was notified of the hearing date in good time, namely on 16 December 2002. The manner in which the hearing date was fixed is also compatible with the Respondent's rules (Rule 25 Doping Rules and Procedures). In view of the organisational measures involved in such proceedings, the fact that the hearing was not adjourned to a weekend especially does not constitute an irregularity in the fixing of the hearing date. The decision of the Chairman of the Disciplinary Committee of 18 January 2003 not to postpone the hearing was also lawful, for the Chairman of the Disciplinary Committee has discretion as regards directions for the conduct of the matter (Rule 25 Doping Rules and Procedures). He exercised this discretion perfectly properly. After all the Appellant filed his application to have the hearing postponed relatively late (11 January 2003), despite the fact that he must have known the reason for his (alleged) impediment for quite some time. Furthermore, the Appellant had indicated that he would be represented. Moreover, not every cause justifies the postponement of a hearing, rather the cause must in any event be a "just" cause. A hearing date requires extensive preparation and usually requires a great number of people to be present. One can therefore assume that the Chairman of the Disciplinary Committee has a duty to postpone the hearing only in cases where a certain threshold of significance is exceeded.

8. The Appellant's submissions do not meet these requirements. The fact that one party says it will not attend the hearing does not in itself constitute just cause. Instead, just cause requires that a party cannot attend for *no fault of his own*. However, the Appellant has not made any substantiated submissions in this regard. A mere statement that his employer will not release him is not sufficient, at least it is not sufficient if the Appellant does not disclose his employer's name and does not produce any evidence of the employer's refusal or evidence that he even tried to obtain a release from work.

9. The allegation that the hearing took place at a place, which was "not suitable" or "not reasonable" for the Appellant has also not been substantiated. In any event, the Appellant could easily cover the distance between his home and the venue for the hearing. This is evidenced by the preceding hearing, which took place before the Disciplinary Committee on 17 July 2002 as well as this present arbitration hearing. The fact that the hearing took place in the Respondent's solicitors' offices can, in itself, be reasonably expected of the Appellant, for a certain amount of infrastructure is required in order to conduct a hearing. The fact that this is provided by the Respondent itself or by its solicitors is quite usual for internal doping cases and is perfectly proper from a legal point of view.

10. Finally it should be pointed out that art. R57 of the Code provides that the Panel shall have full power to review the facts and the law. According to a rule that exists in most legal systems, a complete investigation by an appeal authority, which has the power to hear the case, remedy the flaws in the procedure at first instance. If therefore one were to assume in the present case that there had been a procedural irregularity, it would be cured by these arbitration proceedings.

11. As regards the Appellant's challenge of the Respondent's decision by reference to the press release, this too does not constitute a procedural irregularity. The Respondent did not issue the press release (13 February 2003) until after the hearing before the Disciplinary Committee had ended (11 February 2003). However, since the Disciplinary Committee can in its decision, at the most, take into account circumstances, which happened up until the last hearing day, the press release cannot - as matter of fact - have influenced the Disciplinary Committee's decision. Also, one cannot conclude from the content of the press release that there were any irregularities in the proceedings before the Disciplinary Committee. The question of whether and to what extent the press release was correct or disclosed confidential information can therefore be left aside. Even if this were to be found to be the case, which is very doubtful, the Appellant would, at the most, have a right to claim damages against the Respondent. However, that sort of dispute is not covered by the arbitration agreement.

12. The Appellant's submissions that the Respondent did not provide him with sufficient information about the facts relevant for the decision also cannot be accepted. The principle of a fair hearing is of major importance because of the far-reaching consequences of doping sanctions in doping cases. In accordance with this principle the athlete must be given sufficient and timely information about all of the essential procedural steps. The purpose of this principle is to enable the athlete to reasonably defend himself. However, in the present case the Appellant has not submitted any specific circumstances, which were not brought to the Appellant's attention in time. Nor can the Panel discern what conduct by the Respondent could have made the Appellant's defence more difficult. This is all the more so because not every violation of the principle of a fair hearing makes the decision defective, rather only violations which (might) affect the outcome of the decision. However, the Appellant has failed to make any substantiated submissions on this. Finally, past decisions of the CAS are noted whereby a violation of the right to be heard in the procedure of first instance is deemed to be cured when – as in the present case - there is a complete investigation by an appeal authority (CAS 98/214 B./ International Judo Federation, of 17.3.1999, published in Digest of CAS Awards 1998-2000. pp 308 et seq. marg. no. 10). According to the Appellant's own submissions made at the hearing, he had all of the necessary information in order to reasonably defend his rights both prior to and during the arbitration proceedings.

13. The Panel did not consider that there was any cause to review the decision of the Disciplinary Committee of 11 February 2003 any further than the objections raised by the Appellant. Although art. R57 (1) of the Code gives the Panel power to fully review ex officio the lawfulness or unlawfulness of the decision being challenged, this does not

mean that in the present case the principle of party presentation (i.e. that the court does not conduct its own investigations but relies on facts and evidence placed before it by the parties) - upon which the arbitration proceedings are based (art. R56 of the Code) - is also suspended. At most, therefore, the Panel must investigate the facts of its own accord if this appears appropriate on the basis of the parties' submissions. This is also expressed by Art. R44.3 (2), which refers to Art. R57 (1) Code of Sports-related Arbitration. Based on the facts submitted by the Appellant there are no grounds in the present case to indicate that the Disciplinary Committee's decision is wrong either in fact or in law.

14. Based on Rule 29 (g) (ii) Doping Rules and Procedures, the Respondent declared the Appellant to be ineligible for life. This decision by the Respondent does not stand up to review by this Panel.

15. As a matter of principle, every athlete has a right to receive equal treatment from his sports association. The right particularly means that

- the sports association must comply with the sports rules in relation to the athlete and
- that wherever the rules grant the sports association discretion or the scope to decide as it thinks fit, it must exercise this power in the same way in relation to every athlete.

16. Rule 29 (g) (ii) Doping Rules and Procedures states that where an athlete has committed a second offence he shall be declared ineligible by the Respondent to take part in any athletic event within the United Kingdom or abroad for life. This provision is only applicable in the present case if the positive April Sample constitutes a "second offence".

17. A precondition for this is that the April Sample and the May Sample constitute two separate offences. Whether this is the case has to be ascertained by interpretation in the absence of an express provision in the Respondent's rules. Generally, one must assume that different positive results constitute separate offences. The legal situation is only different if there is a close factual connection between the two positive findings (see CAS 98/203 UCI v. FCI, 20.11.1998, Digest of CAS Awards 1998-2000, p 288 marg. no. 12), so that the positive findings are based on one and the same action. However, this is not so in the present case, for in the May Sample other prohibited substances were (also) found which were not found in the April Sample. In the present case, the Respondent therefore rightly considered the April Sample to constitute a separate breach of the rules. Furthermore, the Respondent was not estopped from doing so by the principle of good faith. As can be seen from the extensive correspondence, contrary to the Appellant's opinion, the Respondent at no time gave the Appellant any reason to believe that it would not treat the April Sample as a separate breach of the rules. Nor does the action taken by the Respondent constitute any unequal treatment to the Appellant's detriment. The facts of the comparisons submitted by the Appellant differ so materially from the case to be decided here that the Appellant has failed to even make any substantiated submissions in this regard.

18. Even if it is thereby established that the Appellant committed two separate offences, this does not necessarily mean that Rule 29 (g) (ii) Doping Rules and Procedures applies in the present case. Instead the April Sample must be considered to be a *second* offence. Whether an offence constitutes a *first* offence or whether it constitutes a *second* offence is matter for debate. The Respondent has not demonstrated to the satisfaction of the Panel that there is any established practice on this issue, either within its own sphere of competence or within that of the IAAF. Common usage of language would suggest that one must look at the chronological sequence of the offences. Pursuant to Rule 5 (a) Doping Rules and Procedures a doping offence is deemed to have been committed when "*a prohibited substance is found to be present within an athlete's body tissue or fluids*". The decisive factor is therefore the date when the prohibited substance was found in the athlete's body. That is either the date when the A sample was analysed or the date of the taking of the sample. It is not the date of the hearing. This also applies if the result of the analysis is - like in the present case - that there is an increased testosterone level. The conclusion drawn from Appendix A footnote (**) of the Doping Rules and Procedures is no different. The text in the footnote states that "*a sample will not be regarded as positive for testosterone where an athlete proves that the abnormal ratio or concentration is attributable to a pathological or physical condition*". Unlike Rule 5 (a) Doping Rules and Procedures, the purpose of this provision is not to govern when a doping offence is deemed to have been committed. Instead the purpose is to give the athlete an opportunity in the hearing - subject to strict conditions - to rebut the presumption that an offence has been committed. The interpretation of the wording of Rule 29 (g) (ii) Doping Rules and Procedures, which refers expressly to a first and a second offence and not to "two offences" as argued by the Respondent's barrister, therefore means that, in the present case, the offence revealed by the April sample was only a *first* offence, not a *second* offence. In other words, the special and unusual circumstances of the present case are not expressly provided for in the existing relevant rules. The wording of the rule is clear but even if there were an ambiguity the 'contra preferentem' rule of interpretation under English law would apply - that is, the interpretation to be adopted is that least favourable to the person putting forward the relevant document.

19. Finally, it should be noted that for the distinction between a first and a second offence the new World Anti-Doping Code refers not only to the sequence of the results of the analysis, but also to other criteria. According to Art. 10.6.1 a *second* anti-doping rule violation implies, "*that the Anti-Doping Organisation can establish that the Athlete received notice, or that the Anti-Doping Organisation made a reasonable attempt to give notice, of the first anti-doping rule violation*". The purpose of this rule is basically to impress upon the athlete the consequences of any (possible) second offence (and consequent threat of a ban for life). If this idea is applied to the present case, then there is a further good argument for considering the positive April Sample to be merely a *first* offence rather than a *second* offence.

20. The special facts of the present case do not require any exception to be made from this outcome. The fact that the IAAF was in agreement with the Respondent´s approach, to treat the April Sample as a separate offence, cannot absolve the Respondent from its duty

to comply with its own rules. The Respondent must decide whether there was a first or second response itself and must assume responsibility for its decision. This follows from Rule 27 Doping Rules and Procedures. According to this, the Respondent decides alone whether Rule 29 (g) (ii) applies (not the Disciplinary Committee or the IAAF). The Respondent cannot therefore simply shift the responsibility for this decision to the IAAF. Furthermore, the extent to which the IAAF said it was in agreement with the Respondent's approach, or any conditions subject to which it declared its agreement, are not clear. The Respondent was in any event unable to submit to the Panel any written declaration by the IAAF. It is therefore also unclear whether the IAAF merely gave the Respondent advice without any obligation or whether it issued a binding direction as to how to proceed in the present case.

21. Practical considerations also do not justify the assumption of a *second* offence in the present case, contrary to the Respondent's rules. Even if one were to assume that the current rules cause the Respondent practical difficulties in conducting doping cases when there have been multiple doping offences - an assumption which in the present case, however, has not been established to the satisfaction of the Panel - this is no reason for the Respondent to disregard its own rules. Whether and the extent to which the rules meet the practical demands is a matter which lies in the Respondent's sphere of risk. The Respondent has a fair amount of discretion when drafting its rules. If it exercised this discretion - as it did in the present case - in a clear and definite manner, it - and also the Panel - are bound by that exercise of discretion. If the Respondent is of the view that its rules as presently drafted disclose a lacuna, its remedy is to amend its rules.

22. To summarize, only Rule 29 (g) (i) (first offence) applies to the positive April Sample in the present case, not Rule 29 (g) (ii) Doping Rules and Procedures. It follows that the Respondent's decision dated 12 February 2003 is therefore to be set aside.

23. Rule 29 (g) (i) Doping Rules and Procedures provides a minimum penalty for a first offence ("*a minimum period of ineligibility of two years*"). Although the penalty has a fixed minimum, the extent of the penalty above that minimum is at the Respondent's discretion. According to the CAS's case law, art. R57 of the Code gives the Panel the power to establish not only whether the decision being challenged was lawful or not, but also to issue an independent decision based on the Respondent's rules. In the present case therefore the Panel does not have to remit the case to the Respondent for it to decide anew. Instead the Panel can make its own decision on the basis of Rule 29 (g) (i) Doping Rules and Procedures in lieu of the Respondent.

24. Applying the provision, the Panel exercises its discretion such that the Appellant is declared ineligible to take part in any athletic event with the United Kingdom or abroad until 11 June 2006. The Panel is aware that the usual penalty under Rule 29 (g) (i) Doping Rules and Procedures is, in practice, for the most part, two years and that in principle this period begins to run as of the date of the hearing before the Disciplinary Committee. However, the special facts of the present case make it necessary to derogate from the "usual case". The Appellant not only contributed very little towards explaining the facts of

the case, instead he in many ways delayed and obstructed the Respondent's conduct of the doping proceedings. He therefore was a major cause of the legal difficulties in the present case. Furthermore, the Panel is of the opinion that it would not be commensurate with the severity of the violation if the minimum penalty of two years were to begin to run as of the date of the hearing before the Disciplinary Committee on 11 February 2003 already, the reason being that - in view of the other ban imposed on the Appellant on 17 July 2003 - any such a sanction would have no adverse effect on the Appellant until 11 June 2004. Although the Panel is of the opinion that the Appellant should not suffer any adverse effects by reason of the Respondent's unlawful conduct, on the other hand the Appellant may not enjoy any benefits either. Having weighed up all of the facts, the Panel therefore considers it reasonable that the two year ban only begins to run when the ban imposed for the positive May Sample expires.

The Court of Arbitration for Sport rules that:

1. The appeal filed by W. on 16 April 2003 is allowed in part.

2. The decision by the Disciplinary Committee of UK Athletics Ltd. dated 11 February 2003, the grounds of which were given on 21 February 2003, is upheld.

3. The decision by UK Athletics Ltd. dated 12 February 2003 by which W. was declared ineligible to take part in any athletic event within the United Kingdom or abroad for life is varied as follows:

   W. is declared ineligible to take part in any athletic event within the United Kingdom or abroad until 11 June 2006.

4. (…)