



Arbitration CAS 2010/A/2072 World Anti-Doping Agency (WADA) v. Federação Bahiana de Futebol (FBF) & Nivaldo Araújo Carneiro Filho, award of 21 October 2010

Panel: Mr Rui Botica Santos (Portugal), President; Prof. Massimo Coccia (Italy); Mr José Juan Pintó (Spain)

Football

Doping (nandrolone)

CAS Jurisdiction and national football cases related to doping

Applicable version of regulations for the procedural and substantial aspects of the case

Applicable sanction in a case where no defence has been filed by an athlete

- 1. A regional body that is an affiliate member of a national football federation, which in turn is a FIFA member is deemed to have submitted itself to the FIFA Regulations. Under the FIFA Anti-Doping Regulations (ADR), WADA has the right to appeal against any internally final and binding doping-related decision passed by FIFA, the Confederations, Members or leagues. WADA has the possibility to appeal against the national decision directly to the CAS and does not need to exhaust the internal remedies even if it does not have *locus standi* (“légitimation active”) to appeal the national decision to a higher judicial body at national level.**
- 2. In a doping-related case, the procedural aspects facing the appeal are governed by the applicable regulations which were in force at the time the decision appealed against was notified to the parties, while the substantive aspects of the appeal are governed by the applicable regulations which were in force at the time the doping test was carried out on the athlete.**
- 3. In a case where no defence has been filed by the athlete pleading a reduction of the minimum two year sanction imposed under Article 45 of the FIFA ADR, the CAS panel is not called upon to consider whether there are any mitigating circumstances or evidence which warrant a reduction of the minimum sanction on grounds of either “no fault or negligence” or “no significant fault or negligence”.**

The World Anti-Doping Agency (the “Appellant” or WADA) is the international independent organisation that promotes, coordinates and monitors the anti-doping programs in sport. It is responsible for the worldwide harmonisation and implementation of national and international anti-doping programs in sport. It is a Swiss private law foundation with its seat in Lausanne, Switzerland, and has its headquarters in Montreal, Canada.

The Federação Bahiana de Futebol (the “First Respondent” or FBF) is a regional football association in the Federal Republic of Brazil, and is affiliated to the Confederação Brasileira de Futebol (CBF). The latter is a member of Fédération Internationale de Football Association (FIFA) and is the body in charge of governing football in the Federal Republic of Brazil.

Mr. Nivaldo Araújo Carneiro Filho (the “Second Respondent” or the “Athlete”) is a professional football player of Brazilian nationality who played for the club Fluminense de Feira (the “Club”) at the time the facts giving rise to the present appeal arose. The Club is affiliated to the FBF. According to the information provided by the FBF, the Athlete is currently unemployed; his last employment contract was with the Brazilian club Alagoinhas Atlético Clube and was effective from 5 December 2009 to 9 May 2010. In this arbitration, the Athlete chose not to defend himself and did not appear before this Panel.

This appeal was filed by WADA against the FBF and the Athlete (the “Respondents”), in relation to the decision rendered by the 2nd Disciplinary Committee of the Tribunal de Justiça Desportiva de Futebol da Bahia (TJDF). This decision (the “TJDF Decision”) relates to a case involving an anti-doping rule violation attributed to the Athlete and was notified by FIFA to WADA on 8 February 2010.

This section contains a summary of the main and relevant background facts, as established on the basis of the Parties’ written submissions and evidence examined in the course of the proceedings.

On 19 April 2009, a 1st Division Bahiano professional championship match was held between the Club and Esporte Club de Bahia. The Athlete took part in this match, representing the Club.

After the said match, anti-doping authorities requested the Athlete to provide a sample of his urine for purposes of conducting an in-competition anti-doping test.

While filling in the doping control form provided to him by the anti-doping authorities, the Athlete stated that he had used some medicines called “BCAA Aminoácido” and “Maltodextrina” and declared his satisfaction with the doping control procedure.

The sample of urine collected from the Athlete was inserted in two sample bottles (A and B) and labelled “CBF-12610” and was taken for analysis by the WADA-approved “Laboratório de Apoio ao Desenvolvimento Tecnológico do Instituto de Química da Universidade Federal do Rio de Janeiro” (Ladetec).

Upon conducting a laboratory analysis of the A sample, Ladetec reported that an adverse analytical finding in the Athlete’s urine marked as Sample A-12610, stating that it had tested positive for Nandrolone (Norandrosterone and Noretiocholanotone). Nandrolone is a prohibited substance classified under “S1. Anabolic Agent” of the 2009 WADA Prohibited List.

On 9 June 2009, the FBF notified the President of the Club of the positive results of the Athlete’s sample. He was informed that in case the Athlete was interested, the FBF was ready to open and analyse his B Sample.

On 10 June 2009, the President of the Club informed the FBF that the Athlete would not be requesting for an analysis of his B Sample. The Club indicated that the Athlete had already explained that certain medicines had been prescribed to him, and were the cause of his adverse analytical finding.

On 12 June 2009, the FBF forwarded the matter to the TJDF which imposed a provisional suspension of 30 days on the Athlete in accordance with art. 102 of the Brazilian Code of Sport Justice (the “CBJD Statutes”).

On 22 June 2009, the Club informed the TJDF that it had “(...) *no knowledge whatsoever about any medication (...) athlete (...) may have taken during the match (...)*” and that “(...) *there are no other matters to be discussed (...)*”.

On 25 June 2009, the secretary of the TJDF confirmed that the Athlete had renounced his right to file a defence.

On 8 July 2009, Mr. Milton Jordão, the General Attorney of the TJDF wrote to the said tribunal informing it that he was of the view that the Athlete had committed an anti-doping rule violation.

The relevant parts of the General Attorney’s letter read as follows (as translated in English):

“(...) From these records we are allowed to conclude that there is no question about the fact that the Respondent has used a prohibited substance during the said football match (...).

Therefore, the violation described in art. 244 of the CBJD is crystal clear (...).

Thus, this office is hereby requesting to have this charge accepted and attached to the records (...) hoping that by the end of the proceedings of the Respondent will be found guilty as charged. (...).”

On 13 July 2009, the matter was heard before the TJDF. The TJDF jury unanimously declared the Athlete guilty and suspended him for a period of 120 days, deducting the 30 days of provisional suspension previously imposed and already served.

On 8 February 2010, FIFA notified WADA of the TJDF Decision.

Dissatisfied with the TJDF Decision, WADA appealed to the Court of Arbitration for Sport (CAS) requesting it to increase the aforesaid ban to 2 years.

On 1 March 2010, the Appellant filed its Statement of Appeal at the CAS pursuant to art. 63.6 of the FIFA Statutes and art. 62.4 of the FIFA Anti Doping Regulations adopted by the FIFA Executive Committee on 19 March 2009 and entered into force on 1st May 2009 (“FIFA ADR edition May 2009”).

In its Statement of Appeal, the Appellant informed the CAS that it was unable to prepare an Appeal Brief stating all the facts and legal arguments giving rise to the appeal because it did not participate in the TJDF proceedings and therefore had no access to the TJDF file.

On 5 July 2010, the Appellant filed its Appeal Brief, stating the facts and legal arguments on which the appeal was based, together with some documents and evidence upon which it intended to rely on, and paid the advance costs.

In the Appeal Brief, the Appellant stated that it reserved its right to ask the Panel for authority to supplement its arguments, file additional exhibits and specify further evidence in accordance with art. R56 of the CAS Code once the Player had filed his answer. It also reserved its right to summon Dr. Olivier Rabin, WADA science Director, to testify via tele- or video-conference.

On 6 July 2010, the CAS notified the Respondents of the Appeal Brief and informed them that they had 20 days pursuant to art. R55 of the CAS Code within which to file their respective Answers. This letter was addressed to the 2nd Respondent via the 1st Respondent's postal address in the expectation that the latter would transmit a copy of the Appeal Brief to the former.

On 26 July 2010, the 1st Respondent wrote to the CAS informing that:

- a) it did not deem its participation in these arbitral proceedings necessary since any award rendered by the CAS would only have an impact on the 2nd Respondent's eligibility to participate in organised football;
- b) it consequently renounced its right to participate in these proceedings, undertaking to comply with any decision rendered by the CAS in connection with any disciplinary sanctions imposed on the 2nd Respondent; and
- c) the arbitral costs be solely borne by the 2nd Respondent.

By 30 August, the 2nd Respondent had not filed his Answer, and following this, the CAS sent a letter to all Parties informing them as follows:

"(...) This is to inform you that, to date, the CAS (...) did not receive Mr Nivaldo Araújo Carneiro Filho's answer which was to be filed by 25 August 2010. Pursuant to Article R55 of the Code of Sports-related Arbitration (...), I inform you that the Panel has decided to nevertheless proceed with the arbitration. (...)"

On the same day, the Order of Procedure was sent to the Parties and was only signed by the Appellant. The Parties were also requested (i) to provide the Panel with a copy of the statutes of the FBF in force in April 2009, (ii) to confirm the period of suspension already served by the 2nd Respondent. The Parties were also informed that the Panel had decided not to hold a hearing and to render an award on the basis of the Parties' written submissions.

On 17 September 2010, the 1st Respondent provided the CAS with a version of the FBF Statutes 2004. It confirmed that the 2nd Respondent *"(...) was sentenced to a suspension of 120 (...) days considering the period of the preventive suspension that he has already served"*.

WADA requested the CAS to rule as follows:

1. *The Appeal of WADA is admissible.*
2. *The decision rendered by the Court of Sports Justice in Football of Bahia, on July 13, 2009, in the matter of Mr. Nivaldo Araújo Carneiro Filho is set aside.*

3. *Mr. Nivaldo Araújo Carneiro Filho is sanctioned with a two-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of ineligibility, whether imposed to or voluntarily accepted by the Player before the entry into force of the CAS award, shall be credited against the total period of ineligibility to be served.*
4. *WADA is granted an award for costs”.*

The FBF renounced its right to participate in these proceedings, stating that its status was that of a passive party since any award could only have an impact on the Athlete’s eligibility to take part in organised football. However, the FBF has been very cooperative with the CAS from a procedural viewpoint.

The Athlete filed no Answer, appointed no counsel to represent him and did not set forth any defence.

LAW

CAS Jurisdiction

1. Art. R47 of the CAS Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body. An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance”.

2. In accordance with Art. 98 of the CBF Statutes, the FBF is an affiliate member of the CBF, being one of the several regional football bodies in Brazil, recognized as “*entidades regionais de administração do desporto*” by Art. 13 of Lei Pelé.
3. In addition to this, the Panel notes that under art. 1.2 of the CBF Statutes:
“All members, bodies and components of CBF, as well as clubs, athletes, referees, trainers, physicians, and other officers belonging to clubs or leagues of the affiliated federations must comply and enforce the compliance, in Brazil, with the Statutes, regulations, guidelines, decisions and the Code of Ethics of the Fédération Internationale de Football Association – FIFA and the Confederação Sudamericana de Fútbol – CONMEBOL”.
4. Furthermore, art. 5.paragraph V of the CBF Statutes states that “[t]he CBF has the following basic purposes: (...) respect, comply with and enforce compliance with the statutes, regulations, guidelines, decisions and other acts issued by the FIFA, CONMEBOL and other international entities to which CBF is affiliated”.

5. In addition to being a regional body established under the CBF, which is a FIFA member, under art. 1 of the FBF Rules 2009 in force as at April 2009, the FBF recognises the FIFA regulations and its superiority by providing as follows:
“All the provisions of Sport Law applicable to Professional Football in the Country and which are superior to the present regulations are necessarily and obligatory part of the legal parameters governing the Championship, such as FIFA Statutes, the Federal laws 9.615/98 and 10.671/03 (Supporters’ Statute), CBF Statutes, organic provisions of Brazilian football (adapted by CBF), the Brazilian Code of Sport Justice (CBJD), FBF Statutes and general norms of official competitions of FBF and RDI’S/CBF/ FBF”.
6. It is not in dispute that CBF and its members, including the FBF and the Athlete have submitted themselves to the FIFA regulations.
7. Art. 63.6 of the FIFA Statutes stipulates that *“[t]he World Anti-Doping Agency (WADA) is entitled to appeal to CAS against any internally final and binding doping-related decision passed by FIFA, the Confederations, Members or leagues (...)”.*
8. Under art. 66.2 of the FIFA ADR edition May 2009, *“[w]here WADA has a right to appeal (...) and no other party has appealed a final decision within the anti-doping organisation’s process, WADA may appeal such a decision directly to CAS without having to exhaust other remedies in the anti-doping organisation’s process”.*
9. It is not clear under Brazilian laws whether WADA has *locus standi* (“*légitimation active*”) to appeal the TJDF Decision to a higher judicial body in Brazil. This is further corroborated by the fact that the TJDF did not notify WADA of its decision dated 13 July 2009 but rather, it was only FIFA which notified WADA of the appealed decision on 8 February 2010.
10. Neither the CBJD Statutes nor the TJDF Decision mentions the deadline within which WADA or any interested third party ought to have filed the said appeal.
11. In the Panel’s view, the absence of any such expression implies that the CBF has decided to waive WADA’s right to exhaust all the remedies available at internal level, and that WADA has the right to appeal the TJDF Decision once it has become final and binding at national level.
12. It follows that the CAS has jurisdiction to decide this dispute. The mission of the Panel follows art. R57 of the CAS Code, according to which a Panel has full power to review the facts and the law of the case. Furthermore, the same article provides that a Panel may issue a new decision which replaces the decision challenges, set the decision aside or refer the case back to the previous instance.

Admissibility

13. Art. 62.5 of the FIFA ADR edition May 2009 states that *“[t]he final deadline for FIFA and WADA to lodge an appeal to CAS shall be 21 days after receipt of both the internally final and binding decision and the complete the file in an official FIFA language”.*

14. The TJDF Decision was notified to WADA on 8 February 2009. WADA filed its Statement of Appeal on 1 March 2010, which was within the deadline set forth under art. 62.5 of the FIFA ADR edition May 2009.
15. WADA filed its Appeal Brief on 10 July 2010 following a notice dated 22 June 2010 issued by the CAS granting it until 10 July 2010 to file its Appeal Brief. It therefore follows that both the Statement of Appeal and the Appeal Brief are admissible.

Applicable Law

16. Art. R58 of the CAS Code provides the following:
“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”.
17. As established on the jurisdiction section hereinabove, the CBF Statutes oblige the TJDF to comply with the FIFA regulations and the CBJD Statutes.
18. This is reiterated under art. 70.3 of the CBF Statutes which stipulates that *“[t]he autonomy and independence of the sports tribunals does not allow and/or imply that the sports tribunals can dispense away with the duty to comply with the Statutes, regulations, circulars and decisions of the FIFA Code of Ethics, and the sports tribunals are bound to respect the norms and principles of the FIFA Disciplinary Code, which is of universal application, as well as the Brazilian Code of Sports Justice (CBJD), which is of national application”.*
19. It is therefore apparent that both the CBF Statutes and the FBF Rules 2009 recognise and provide for the application by the TJDF of the FIFA regulations as well as Brazilian sports laws.
20. The application of the FIFA regulations is further corroborated by art. 62.2 of the FIFA Statutes which establishes the additional application of Swiss law by stating that *“[t]he provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA [...] and, additionally, Swiss law”.*
21. By participating in the FBF championship, the Athlete has also clearly agreed to abide by the FBF Rules and consequently those of the CBF and FIFA. Moreover, in accordance with art. 1.2 of the CBF Statutes (quoted above at paragraph 80), all athletes must comply with the rules of FIFA.
22. For all the foregoing, the Panel is of the view, as did the Panel in the Dodô Case and in CAS 2009/A/1903 that the law applicable to the present dispute shall primarily be the FIFA regulations, the FBF Rules, the CBF regulations and Brazilian law in subsidiary. In case of a conflict between these regulations, the provisions of the FIFA regulations shall prevail. Swiss law may also be additionally applied, particularly in reference to the interpretation and

application of FIFA rules, being rules issued by a private association incorporated in Switzerland.

23. In relation to the applicable version of the FIFA regulations, the Panel shares the findings made in CAS 2000/A/274, at paras. 207 et seq¹ that the procedural aspects facing the appeal shall be governed by the applicable regulations which were in force at the time the TJDF Decision was notified *i.e* on 13 July 2009. The substantive aspects of the appeal shall be governed by the applicable regulations which were in force at the time the doping test was carried out on the Athlete, *i.e* on 19 April 2009.
24. In light of the aforementioned, the substantive aspects of the appeal shall be addressed through reference to (i) the FIFA Anti Doping Regulations adopted by the FIFA Executive Committee on 20 December 2008 and which came into force on 1 January 2009 (the “FADR edition January 2009”), and where relevant and necessary (ii) the FBF Rules 2009 (iii) the CBF Statutes in force in April 2009, and (iv) the FBF Statutes 2004 in force as at April 2009.
25. The FIFA ADR edition May 2009 shall be referred in addressing the procedural aspects of the appeal.

The Merits of the Appeal

26. Moving to the substance of the matter, the Panel has identified the following issues for analysis in order to determine the dispute.
 - A. *Whether the Athlete committed an anti-doping rule violation*
 - B. *If the Athlete is found to have committed an anti-doping rule violation, what is the sanction applicable?*
- A. *Has the Athlete committed an anti-doping rule violation?*
27. It is not in dispute that Nandrolone is a prohibited substance classified under “S1. Anabolic Agent” of the 2009 WADA Prohibited List. FIFA has also incorporated WADA’s list of prohibited substances under section 15.1 of the FIFA ADR edition January 2009.
28. Under art. 5.1 of the FIFA ADR edition January 2009, “[i]t is each player’s personal duty to ensure that no prohibited substance enters his body. Players are responsible for any prohibited substance or its metabolites or markers found to be present in their samples. Accordingly, it is not necessary that intent, fault, negligence or knowing use on the player’s part be demonstrated in order to establish an anti-doping violation under this article”.

¹ CAS 2000/A/274, at para. 208-209: “Under Swiss law, the prohibition against the retroactive application of law is well-established. In general, it is necessary to apply those laws, regulations or rules that were in force at the time the facts at issue occurred (...). This general principle is however subject to several exceptions, including an exception for laws or rules that are procedural in nature. In the absence of an express provision to the contrary, laws and rules relating to procedural matters apply immediately upon entering into force and regardless of when the facts at issue occurred (...).”

29. Art. 5.2 of the FIFA ADR edition January 2009 adds that “[s]ufficient proof of an anti-doping rule violation (...) is established by either the following: the presence of a prohibited substance or its metabolites or markers in the player’s “A” Sample where the player waives analysis of the “B” sample and the “B” sample is not analysed”.
30. Art. 13.1² of the FIFA ADR edition January 2009 sets the burden of proving that an anti-doping rule violation has occurred to the “comfortable satisfaction” of the deciding body, *i.e.* not greater than a mere balance of probability but less than proof beyond reasonable doubt.
31. Once a prosecuting party (in this case WADA) has met this required standard, the burden of proof shifts to the Athlete, who is required to establish specified facts or circumstances rebutting the presumption that he has committed an anti doping rule violation (cf art. 13.2³ of the FIFA ADR edition January 2009).
32. Despite having failed and/or waived his right to defend himself before the CAS, the Panel notes that the Athlete has not disputed the results issued by Ladetec, and has particularly not denied that Nandrolone was found to be present in his body.
33. This is evidenced in the letter dated 10 June 2009 sent by the President of the Club to the FBF. The contents of this letter were clear of the Athlete’s position that although an adverse analytical finding of Nandrolone had been found in his body, it had been caused by certain medicines which had been prescribed to him⁴.
34. Corroborating the fact that a prohibited substance had been found in the Athlete’s body are:
 - I. the letter dated 8 July 2009 by the General Attorney of the TJDF stating that “(...) *there is no question about the fact that the Respondent has used a prohibited substance during the said football match (...). Therefore, the violation described in art. 244 of the CBJD is crystal clear (...)*”, and;
 - II. the TJDF Decision, which unanimously found him guilty of having used a prohibited substance.
35. In light of the facts and evidence tabled and following the absence of any evidence from the Athlete rebutting the said facts and evidence, the Panel is comfortably satisfied that the 2nd Respondent committed an anti-doping rule violation contrary to art.5 of the FIFA ADR edition January 2009.

² Art. 13.1 FIFA ADR edition January 2009: “*The standard of proof shall be (...) to the comfortable satisfaction of the Disciplinary Committee bearing in mind the seriousness of the allegation that is made. In all cases, this standard of proof is greater than a mere balance of probability but less than proof beyond a reasonable doubt*”.

³ Art. 13.2 of the FIFA ADR edition January 2009: “*Where the FIFA Anti-Doping Regulations place the burden of proof upon the player or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability (...)*”.

⁴ The Panel however notes that on 22 June 2009, the Club personally denied having any knowledge whatsoever in relation to any medication the Athlete may have taken.

B. *The relevant sanction and period of commencement*

36. In accordance with art. 45 of the FIFA ADR edition January 2009 “[t]he period of ineligibility imposed for a violation of art. 5 (presence of prohibited substance) (...) shall be two (2) years unless the conditions for eliminating or reducing the period of ineligibility, as provided in art. 47-50, or the conditions for increasing the period of ineligibility, as provided in art. 51, are met”.
37. No defence has been filed by the Athlete pleading a reduction of the minimum two year sanction imposed under art. 45 above. The Panel is therefore not called upon to consider whether there are any mitigating circumstances or evidence which warrant a reduction of the minimum sanction on grounds of either “no fault or negligence” or “no significant fault or negligence”.
38. Consequently, and in accordance with art. 54.1 of the FIFA ADR edition January 2009, the Panel hereby declares the Athlete ineligible to participate, in any capacity, in any competition or activity authorised or organised by FIFA or an association, a club or other member organisation of an association, the International Olympic Committee, the International Paralympics Committee or any other International Federation or their member associations, or in competitions authorised or organised by any professional league, or any international or national level competition organisation, for a period of two (2) years.
39. However, Art. 53.1 of the FIFA ADR edition January 2009 states that “(...) the period of ineligibility shall start as soon as the decision providing for ineligibility is communicated to the player concerned. Any period of provisional suspension (whether imposed or voluntarily accepted) shall be credited against the total period of ineligibility imposed”.
40. The Panel notes that the TJDF banned the Athlete for a period of 120 days, deducting the 30 days temporary suspension he had provisionally served before the TJDF Decision.
41. On 17 September 2010, the FBF confirmed that the Athlete had been suspended for 120 days considering the 30 day period of preventive suspension he had earlier served. It hence means that the Athlete served a total of 120 days of suspension. This period already served by the Athlete shall be credited against the 2 year ineligibility period to be imposed on him and which comes into effect on the day of service of the present arbitral award.

The Court of Arbitration for Sport rules:

1. The appeal filed by the World Anti-Doping Agency against the decision dated 13 July 2009 rendered by the 2nd Disciplinary Committee of the Tribunal de Justiça Desportiva do Futebol da Bahia is upheld.
2. The decision dated 13 July 2009 rendered by the 2nd Disciplinary Committee of the Tribunal de Justiça Desportiva do Futebol da Bahia is set aside.
3. Mr. Nivaldo Araújo Carneiro Filho is found guilty of an anti-doping rule violation under article 5.1 of the FIFA Anti Doping Regulations edition 1 January 2009.
4. Mr. Nivaldo Araújo Carneiro Filho is declared ineligible for a period of two (2) years with effect from the date of this award, deducting the period of one hundred and twenty (120) days already served.
5. (...).
6. (...).
7. All other motions or prayers for relief are dismissed.