



Arbitration CAS 2014/A/3480 Cunyet Yuksel v. Turkish Athletic Federation (TAF), award of 20 June 2014

Panel: Judge James Robert Reid (United Kingdom), Sole arbitrator

Athletics

Disciplinary sanctions against a coach for a doping offence committed by one of his athlete

Automatic liability of the coach

Referral of the case back to the previous instance where no full investigation of the facts was conducted

1. **In absence of any indication from a disciplinary body on how it is purporting to apply a principle of liability without fault, the view of that body according to which a coach is automatically liable of the anti-doping offence committed by one of his athlete unless he can prove that he has taken reasonable care to prevent the commission of the offence is misleading.**
2. **The referral is a necessary measure where the disciplinary body, owing to its erroneous view of the law, has not conducted a full investigation of the facts. Accordingly, the appropriate course is to annul the decision and refer the matter back to the disciplinary body according to Article R57 of the CAS Code.**

I. PARTIES

1. The Appellant, Mr. Cunyet Yuksel (the “Coach”), is an athletics coach of Turkish nationality working as support personnel for Ms. Nevin Yanit (the “Athlete”), a Turkish female sprinter specialising in high hurdling. She is an international level athlete under the IAAF Competition Rules 2013-14 (the “IAAF Rules”). The Coach is an official athletics coach duly licensed by the Turkish Athletics Federation (the “TAF”).
2. The Respondent, TAF, is the national federation governing the sport of athletics in Turkey. Its principal place of business is in Ankara, Turkey.

II. THE BACKGROUND FACTS

3. The Coach was at all material times the coach of the Athlete.

4. On 8 February 2013, a sample was collected from the Athlete by IAAF Doping Control personnel during testing at Dusseldorf, Germany. On analysis the sample revealed a positive finding for a prohibited substance.
5. On 27 August 2013, the Athlete was found guilty of an anti-doping rule violation by the TAF Disciplinary Board (the “Disciplinary Board”) and a penalty of two years ineligibility was imposed on her. The Athlete has not appealed against the decision or the sanction imposed.
6. By a letter dated 4 November 2013, the Disciplinary Board informed the Coach that a case had been opened against him “*due to [his] responsibility as the coach of athlete Nevin Yanit by means of article 36/1-a-I of Turkish Athletics Federation Disciplinary Regulations*”. He was requested to provide his defence and any exhibits within 7 days, which he did through his legal representative on 11 November 2013.
7. A hearing before the Disciplinary Board was held on 26 November 2013 at which the Coach and his legal representative were permitted to examine the TAF file and at which the Coach presented written evidence from the Athlete by which she asserted that he had never provided her with any prohibited substance or method listed under the WADA Prohibited List and had never encouraged her to use any such substance or method.
8. By its decision dated 2 December 2013, the Disciplinary Board held that the Coach was liable “*due to an athlete who does doping, pursuant to articles 36 and 40 of TAFCT*” and imposed a sanction of 18 months ineligibility on him commencing from the date of the decision. Such ineligibility was not some purely local penalty but applied to all athletic activity falling under the aegis of the IAAF.
9. The decision was communicated to the Coach by an e-mail dated 16 December 2013 attaching a letter bearing date 13 December 2013, along with a copy of the reasons for the decision.
10. The decision stated, by reference to TAFCT articles 52 and 53, the Coach could appeal within five (5) days to the Arbitration Board of the Turkish Directorate of Youth and Sport (“the Arbitration Board”). It made no reference to any right to appeal to the Court of Arbitration for Sport in Lausanne, Switzerland (“CAS”).
11. The Coach lodged an appeal to the Arbitration Board without prejudice to his right to appeal to CAS.
12. On 13 February 2014, the Arbitration Board heard and allowed the Coach’s appeal, thereby cancelling the 18-month sanction imposed by the Disciplinary Board and directing the Disciplinary Board “*to take a new decision on the case*”.

III. PROCEEDINGS BEFORE THE CAS

13. On 29 January 2014, the Coach filed his Statement of Appeal at the CAS in accordance with Article R47 et seq. of the Code of Sports-related Arbitration (“the Code”) requesting that the decision of the Penal Board dated 3 December 2013 be set aside and seeking costs. In his

statement of appeal, the Appellant requested that this appeal be submitted to a Sole Arbitrator and that the proceeding be conducted in English.

14. On 3 February 2014, the CAS Court Office acknowledged receipt of the statement of appeal, and invited the Coach to file his Appeal Brief in accordance with Article R51 of the Code. TAF was also invited to comment on the Coach's request for a Sole Arbitrator and the proceedings to be conducted in English.
15. On 11 February 2014, having received no response from TAF, the CAS Court Office confirmed with the parties that the President of the CAS Appeals Arbitration Division, of his Deputy, would decide on the number of arbitrators in accordance with Article R50 of the Code. Moreover, the CAS Court Office confirmed that this procedure would be conducted in English.
16. On 14 February 2014, the Coach filed his Appeal Brief with CAS in accordance with Article R51 of the Code.
17. On 19 February 2014, the CAS Court Office acknowledged receipt of the Coach's appeal brief and invited TAF to file its answer within a period of twenty (20) days in accordance with Article R55 of the Code.
18. On 31 March 2014, having received no answer, the CAS Court Office wrote to the Respondent seeking proof of filing of its answer. No such response was provided.
19. On 2 April 2014, the CAS Court Office confirmed in accordance with Article R54 of the Code that the President of the CAS Appeals Arbitration Division appointed His Honour James Robert Reid Q.C., West Liss, Hampshire, England as Sole Arbitrator in this appeal.
20. On 8 April 2014, the CAS Court Office, on behalf of the Sole Arbitrator and pursuant to Article R57 of the Code, invited the TAF to file a copy of the TAF case file referred to in the Coach's appeal brief.
21. On 11 April 2014, the TAF informed the CAS that the Disciplinary Board would be meeting in a few weeks to take a fresh decision on the Coach's case. The TAF inquired whether, as the decision of the Disciplinary Board was not final, the copy file was still required.
22. On 14 April 2014, the Coach confirmed that he preferred the Sole Arbitrator to render a decision based solely on the written submissions, without an oral hearing. The Respondent did not state its position in this regard.
23. On 23 May 2014, the TAF filed a translated copy of its case file, and such case file was forwarded to the parties accordingly.
24. On 27 May 2014, the CAS Court Office, on behalf of the Sole Arbitrator, informed the parties that the Sole Arbitrator deemed himself sufficiently well informed and decided to render a decision based sole on the written submissions in accordance with Article R57 of the Code.

25. On 10 June 2014, the Coach signed and returned the Order of Procedure and on 11 June 2014, the TAF signed and returned the Order of Procedure.

IV. ADMISSIBILITY OF THE APPEAL AND JURISDICTION

26. It is now well settled that international sporting federations enjoy the principal competence in the fight against doping. See Advisory Opinion CAS 94/128, esp at para 21 and CAS 98/192. The Disciplinary Board recognized this stating “[a]ccordingly, rules established by International Federations will have the priority of being applied firstly”. As was stated in the Advisory Opinion: “The natural consequence of this is that their rules prevail over those of an NOC or national sports authority (for example an NF) might have enacted”.
27. By Rule 42.1 of the IAAF Rules, and unless specifically stated otherwise, all decisions made under those anti-doping rules may be appealed in accordance with the provisions there set out.
28. By Rule 42.13 of the IAAF Rules, in cases involving International-Level Athletes or their Athletic Support Personnel, the first instance decision of the relevant body of the Member (i.e. the TAF in this case) shall not be subject to further review or appeal at national level and shall be appealed only to the CAS in accordance with the provisions then set out.
29. This rule is in rather different terms to its predecessor at Rule 60.11 of the 2009 IAAF Rules which provided: “In cases involving International-Level Athletes (or their athlete support personnel) ... the decision of the relevant body of the member of the IAAF (as appropriate) may be appealed exclusively to CAS ...”. In CAS 2008/A/1585 and CAS 2008/A/1586 it was held that the rule did not exclude the possibility that a review body might exist at national level for decisions concerning international level athletes. It would appear that the different terminology used in the current rule was intended to make clear that no national level review of decisions involving international-level athletes was admissible.
30. By Article R47 of the Code: “An appeal against the decision of a federation association or sports related body may be filed with CAS if the statutes or regulations of the said body so provide ... if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body”.
31. In the light of the terms of Rules 42.1 and 42.13 of the 2013 IAAF Rules, it is clear that the proper route of appeal against the decision of the TAF Disciplinary Board in this case, which involves a member of an international-level athlete’s support personnel, is to the CAS and the proceedings before the Arbitration Board will not be recognised by the IAAF or WADA.
32. By Rule 42.13 of the IAAF Rules, an appellant has 45 days from the date of communication of the written reasons of the decision to be appealed in which to lodge a statement of appeal with CAS. Since the written reasons were communicated to the Athlete on 16 December 2013 and the statement of appeal was lodged on 29 January 2014, the Coach’s appeal was timely.

V. APPLICABLE LAW

33. By Article R57 of the Code of Sports-related Arbitration (the “Code”) the Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.
34. Article R58 of the Code provides 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”.*
35. Accordingly, this appeal is to be determined according to the regulations of the TAF and the IAAF, and subsidiarily (the parties not having chosen any other law) Turkish law.

VI. PARTIES’ SUBMISSIONS

36. On behalf of the Coach it was submitted that:
- There was no evidence before the Disciplinary Board which linked the Coach to any anti-doping rule violation by the Athlete.
 - The Disciplinary Board mistakenly proceeded on the basis that there was a legal assumption that liability without fault could be imposed on the coach of an athlete found to have committed an anti-doping offence.
 - The burden of proof lay on the TAF to establish an anti-doping offence by the Coach to the appropriate legal standard which is lower than the criminal standard of proof but higher than a mere balance of probabilities.
 - The Disciplinary Board had misinterpreted previous decisions by CAS in CAS 95/150, CAS 2001/A/317, and CAS 92/86 as entitling it to impose strict liability on a coach merely because an athlete had been found to have committed an anti-doping offence.
 - The Athlete herself had provided evidence that the Coach had not provided her with any prohibited substance and/or method and had never encouraged her to use prohibited substances or methods.
 - The Disciplinary Board apparently held that the Coach was negligent in failing to be aware of the Athlete’s improved performance and that it might be due to using prohibited substances.

There was no basis for the finding of the Disciplinary Board which ought to be set aside.

37. In its appeal brief, the Coach sought the following relief: “(1) *Setting aside the decision of the Turkish Athletics Federation dated 2 December 2013 (2013/81 E. 2013/77 K.); (2) declaring that no anti-doping rule violation by Mr. Cüneyt Yüksel has been established; (3) Condemning the Turkish Athletics Federation to pay the arbitration costs; and (4) Ordering the Turkish Athletics Federation to reimburse Mr. Cüneyt Yüksel costs incurred in the CAS Appeal*”.
38. The TAF made no substantive response to the appeal, taking the view that as the decision of the Disciplinary Panel had been set aside by the Arbitration Board and the matter was due to be re-heard by the Disciplinary Board, there was no extant decision in the case.

VII. DISCUSSION

39. The file produced by TAF as the case file before the Disciplinary Board is remarkably skimpy. It does not reveal any evidence, not even evidence of the disciplinary proceedings against the Athlete or the findings in which formed the basis of the charge against the Coach.
40. The Disciplinary Board’s decision can be summarised as follows:
- CAS 95/150 established that liability without fault could be imposed on a coach once the initial fact of a doping offence by an athlete under his aegis had been established.
 - Mere assertions of innocence or lack of interest in administering a prohibited substance are not sufficient to exonerate a person.
 - The standard of proof required to establish the initial fact of an anti-doping offence is less than the criminal standard but greater than the civil standard.
 - The coach is the person responsible for protecting his athlete’s physical and mental health.
 - An athlete reposes trust and confidence in his coach who is the person responsible for the athlete’s training preparation and tactics.
 - When the initial fact has been established, to escape liability the coach must show (on the balance of probabilities) that he took the necessary care to prevent elements affecting fair competition.
 - The fact that a lot of athletes in the competition tested positive for doping showed that doping was supported.
 - A coach can intuit changes in performance and must know when an athlete is violating an anti-doping rule.
 - Under Article 36 of TAFCT, a coach is to be sanctioned with two-years ineligibility for a first offence, but in all the circumstances there should be a reduction in that penalty of a quarter.
41. It is apparent that the Disciplinary Board gave no weight to the Athlete’s statement. This is not surprising. Not only did she assert that the Coach had not provided her with a prohibited

substance or method and that he had not encouraged her to use any prohibited substance or method, but she also asserted that she had never used or attempted to use any prohibited substance or method throughout her professional career as an athlete. In the light of the finding against her of an anti-doping violation and the imposition of a two-year period of ineligibility against which she had not appealed, it would have been remarkable if the Disciplinary Board had given weight to her assertions of the innocence of herself and the Coach.

42. It is not clear from the terms of the decision of the Disciplinary Board how it was purporting to apply a principle of liability without fault. On one reading of the decision the Disciplinary Board appears to have been taking the view that because the Athlete committed an anti-doping offence, the Coach was automatically liable unless he could prove that he had taken reasonable care to prevent the commission of the offence. If this is what the Disciplinary Board was saying, it was in error.
43. The Disciplinary Board referred to three decisions of CAS in dealing with the substance of the Coach's case
44. The reference to CAS 92/86 (a decision later followed in CAS 2006/A/1132) is of no assistance. In that case the rider of a horse which tested positive for a banned substance (clenbuterol) in its system could not escape liability by giving evidence that he had not given the substance to the horse, that it must have been given by an unknown third party and that he had no reason to have administered the substance. The relationship between an athlete and his coach is different from the relationship between a horse and the person responsible for it. While there will be an onus of proof on a person responsible for a horse to show how a prohibited substance came into the horse for which he was responsible without his fault, it cannot be said that there is an onus of proof on a coach to show how a banned substance came to be in an athlete without his fault.
45. A disciplinary tribunal might properly infer, given the appropriate material, that a coach had been party to an athlete's misuse of a prohibited substance. A factor might perhaps be that a number of athletes using the same coach all tested positive for banned substances, but the only indication that this formed part of the Disciplinary Panel's reasoning is the statement "The fact that a lot of athletes in the competition were tested positive for doping shows that doping was supported".
46. The CAS decision CAS 95/150 is similarly of no assistance. In that case the trainer of a swimmer gave her a pill for a headache unaware that it contained a banned substance. The trainer was caught by the principle of strict liability in that he could not escape liability by asserting that he had no intention to give a banned substance and was unaware that the pill contained a banned substance. In the present case, there is no evidence revealed in the file that the Coach administered something to the Athlete but did so under the impression that it did not contain a banned substance.
47. In CAS 2001/A/317, the main issue related to whether there was an onus of proof on an athlete to show a lack of culpability once the objective fact of the presence of a banned

substance had been established. It dealt with the onus and standard of proof but has no effective bearing on the present case.

48. Looking at the entirety of the decision of the Disciplinary Board it appears that the Disciplinary Board misled itself as to the legal position in relation to the potential liability of a coach when one of his athletes had been found to have committed an anti-doping offence. It is apparent that having taken this mistaken view, the Disciplinary Board did not then go on to investigate or consider what (if any evidence) there was against the Coach, mistakenly taking the view that the onus was on him to show he was guilty of no wrong doing or negligence.
49. The TAF, having taken no effective part in this appeal, there has been no argument addressed, and no evidence adduced, to seek to uphold the decision taken by the Disciplinary Board. This may not be surprising in the light of the domestic decision of the Arbitration Board to set aside the decision of the Disciplinary Board and to remit the case for re-consideration, and the TAF's expressed view that there is at present no decision of the Disciplinary Board. However it does leave CAS in the awkward position of dealing with an appeal in which only one side has been heard.
50. It is clear that the decision of the Disciplinary Board is flawed and cannot stand. The question then is what relief should be given to the Coach.
51. By his Statement of Appeal the substantive relief sought by the Coach was the setting aside of the decision of 3 December 2013. This request was amplified in his Appeal Brief to add a claim for a declaration that "no anti-doping rule violation by [the Coach] has been established". This is a step too far in the light of the incomplete investigation of the case by the Disciplinary Board. While the decision of the Disciplinary Board must be annulled, it does not follow that a declaration that no violation has been established should be made.
52. Article 57 of the Code specifically provides that the Panel may "issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance". The referral is generally ordered when the merits of a case have not been examined by the previous authority, for instance when it has ruled against its own jurisdiction. The referral is a necessary measure in the present case where the Disciplinary Board, owing to its erroneous view of the law, has not conducted a full investigation of the facts. Accordingly, the appropriate course is to annul the decision and refer the matter back to the Disciplinary Board.

VIII. CONCLUSION

53. The appeal must be allowed and the decision of the Disciplinary Board annulled. The case will be referred back to the Disciplinary Board for re-consideration.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr. Cünyet Yüksel on 29 January 2014 is upheld.
2. The decision of the Turkish Athletics Federation Disciplinary Board dated 3 December 2013 is annulled.
3. The case is referred back to the Turkish Athletics Federation Disciplinary Board.
4. (...).
5. (...).
6. All other motions or prayers for relief are dismissed.