



Arbitration CAS 2017/A/5421 Bastiaan van Willigen v. Nederlandse Basketball Bond, award of 14 May 2018

Panel: Mr Pieter Kalbfleisch (The Netherlands), Sole Arbitrator

Basketball

Disciplinary sanction against a coach for a violation of the code of conduct applicable within the association

Identification of the author of a publication of a message on Facebook

Violation of the applicable regulations by the publication of an insulting message

Jurisdiction of the federation to sanction the coach

Proportionality of the sanction

1. Where it is an established fact that the publication of a message on the page of the Facebook Group bears the name of a particular coach, it is up to the latter to prove that his account has been hacked. Absent any plausible explanation, witness's statement, or production of any other evidence to substantiate his view in this respect, it can be concluded that it is the coach himself who put deliberately the "post" on Facebook.
2. According to the federation's regulation, every act or omission by which the smooth running of things can be hampered or by which the interests of the federation can be harmed, in the broadest sense of the word, constitutes a violation of the regulations. If not defamatory, an insulting message (accusation of criminal offence) addressed by one member of the federation to another who can be clearly identified amongst the specific sport community in front of a specific (be it on-line) audience of fans (among which junior players) constitutes a violation of the regulations and harms the promotion of the sport which is the purpose of the federation.
3. Where a violation of the federation's regulation is committed by a member, the internal bodies of the federation have jurisdiction to impose sanctions on that member.
4. CAS panels shall show restraint when reviewing the level of sanctions imposed by a disciplinary body. The sanction imposed by that body in the exercise of its discretion can only be reviewed "*where the sanction is evidently and grossly disproportionate to the offence*". The principle of proportionality requires that there be a reasonable balance between the nature of the misconduct and the sanction. Each situation must be evaluated on a case-by-case basis and the interests at stake have to be balanced.

I. PARTIES

1. Bastiaan van Willigen (the “Appellant”) is a member of the Nederlandse Basketball Bond living in Amsterdam, the Netherlands. He identifies himself in an email as “coach DTL Apollo/Waterland” (a basketball club in the Netherlands). Professionally he is working in the IT-branch.
2. The Nederlandse Basketball Bond (the “NBB” or the “Respondent”) is the Dutch Basketball Association. It has its seat in Nieuwegein, the Netherlands. According to its Articles of Association, *“the purpose of the NBB is to practice and to promote the practice of the basketball sport in the Netherlands [...] in the broadest sense of the word”*. The NBB has as members both (omni)clubs and natural persons.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.
4. As stated and argued by one party and acknowledged or not sufficiently contested by the other party as well as partly demonstrated by the non-challenged and insufficiently contested exhibits the Sole Arbitrator takes for granted and starts his considerations and deliberations on the basis of the following facts.
5. On or about 16 May 2017, a discussion developed in the *“Facebookgroep Basketbal liefhebbers NL/BL”* (hereafter: the “Facebook Group”; this is a so-called Facebook community visited by (basketball-) players, parents of (young) players, coaches and basketball fans. This community amounts more than 1.500 members.
6. In the course of this discussion there appeared what the parties differently call a post or a message or a picture (the “Post”) with the following text: *“This one for you U12 and U24 coach”* with a picture of the cartoon figure Winnie the Pooh leading a small companion to a sort of forest with a text imposed or added in this picture: *“The further Pooh led him into the forest, the more concerned Piglet became that Pooh wasn’t wearing any fucking pants”*.
7. This Post bears as name of the sender “Bas Van Willigen”.
8. The NBB produced in the disciplinary proceedings in the Netherlands a copy of some reactions as result of this message, of which some were very critical; Richard Kater for example wrote *“Bas ... keep your personal shit against people outside this group”* and another, Eric Kropf, remarked *“[...] Haven’t you been recently seriously suspended by the Disciplinary Committee?”*, to which the same Eric Kropf later added *“[...] And then you involve a third person in a disgraceful way”*.

9. The moderator of the Facebook Group removed the Post and the ensuing discussion after a few days.
10. From the text and context of this discussion – notably the e-mails which were part of the disciplinary proceedings in the Netherlands – it can be derived that the aforementioned “U 12 and U 24 coach” is Mr G. van der Hijden, the coach of another basketball club in the Netherlands, competing against amongst others DTL Apollo/Waterland.
11. Mr van der Hijden joined the NBB in its disciplinary proceedings against the Appellant.
12. The Appellant has previously been sanctioned by the NBB Disciplinary and Disputes Commission (ruling 2014-143) on account of “*acting as a member of NBB in violation of the manners used within the NBB*”, more specifically “*the screaming from the stands, along with NN, of the word “paedophile” or words of similar substance towards Mr G. van der Hijden*”. For this violation of the rules the Appellant was suspended for a period of two months.
13. By decision of 14 October 2017, upon request of the Board of the NBB, the Disciplinary and Disputes Commission of the NBB imposed a disciplinary sanction on the Appellant. The Disciplinary and Disputes Commission of the NBB has declared the Appellant guilty of “*Acting as a member of NBB in violation of the code of conduct applicable within the association. Concretely, the posting of messages in a basketball-related FB-group which are offensive towards another member of NB and whereby the boundaries of decency and respect have been crossed to such an extent, that they do not correspond with the policy of a safe sports environment as is strived for within NBB*”. The Chamber has decided that the following sanction has been imposed on him on that account: “*Mr B. van Willigen is suspended as a member of NBB as of 15 October 2017 until 1 January 2018*”. The Appealed Decision further stated that “[t]he filing of a potential appeal would suspend the implementation of this sanction”.
14. On 27 October 2017, the Appellant timely filed an appeal against this decision with the Committee of Appeal of the NBB (the “NBB Committee of Appeal”).
15. By decision of the NBB Committee of Appeal dated 8 November 2017 (the “Appealed Decision”), the Appellant’s appeal was rejected and he was suspended as a member of the NBB for a period of one year, of which three months are unconditional. The operative part of the Appealed Decision reads as follows (emphasis in original):

*“Pronouncing judgment in the appeal, the Commission imposes a suspension on appellant as a member of the NBB for the duration of **one (1) year of which 3 months without probation, with a probationary period until 31 December 2019**. The sanction will enter into effect on the day after sending the present ruling”.*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 29 November 2017, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the “CAS”) in accordance with Article R48 of the Code of Sports-related Arbitration (the “CAS Code”). The Statement of Appeal was accompanied by

attachments, many of them in Dutch language. On the same day, the Appellant filed two more appendixes. The Appellant requested that the case be submitted to a Sole Arbitrator of Dutch nationality. He also applied for a stay of execution of the Appealed Decision.

17. On 7 December 2017, the Appellant filed his Appeal Brief pursuant to Article R51 of the CAS Code. The Appellant referred in his Appeal Brief to the English translation of the grounds of appeal before the NBB Committee of Appeal.
18. On 8 December 2018, the Respondent agreed that a Sole Arbitrator of Dutch nationality be appointed.
19. On 12 December 2107, the NBB declared not to have objections to the stay of execution “*for reasons of procedural economy*”.
20. In view of this correspondence the request for a stay of execution was granted by the President of the CAS Appeals Arbitration Division on 13 December 2017.
21. On 21 December 2017, answering both the Statement of Appeal and the Appeal Brief, the NBB filed its answer with several enclosures, some of them in Dutch only.
22. On 27 December 2017, the NBB supplemented its answer in defense to the grounds of appeal of the Appellant.
23. On 30 January 2018, pursuant to Article R54 of the CAS Code and on behalf of the President of the CAS Appeals Arbitration Division, the parties were informed that the arbitral tribunal appointed to decide the present matter was constituted as follows:

Sole Arbitrator: Mr Pieter Kalbfleisch, Attorney-at-law in The Hague, Netherlands
24. On 23 February 2018, the parties were advised that, in view of the fact that they “*strongly wish to cut costs*”, respectively “*to minimize the costs*”, the Sole Arbitrator deemed it not necessary to translate into English the documents and appendixes in Dutch, despite the fact that the language of the arbitration is English. The Sole Arbitrator considered that neither the rights of the parties nor the dispensation of fair justice would be jeopardized in this way. Besides, the Sole Arbitrator found that the content of the appendixes in the Dutch language was not conflicting with the positions of the parties as taken in their official documents in this arbitration; the Dutch documents contain a mere detailed clarification of what has been stated in the documents in the English language.
25. Given these last considerations, the Sole Arbitrator deemed a hearing not necessary either, being sufficiently well informed to deliver this final award.
26. Accordingly, on 23 February 2018, the CAS communicated to the parties the intention of the Sole Arbitrator not to organise a hearing. The Order of Procedure was drafted accordingly and sent to the parties by e-mail on the same day.
27. On 1 March, both parties returned the duly signed Order of procedure by e-mail.

IV. SUBMISSIONS OF THE PARTIES

28. Against the background of these non-disputed and established facts the parties' positions in this arbitration may be summarised as follows.
29. In his Statement of Appeal, the Appellant referred to the grounds of appeal filed before the NBB Committee of Appeal. He argues that the Disciplinary and Disputes Commission of the NBB had no competence in the procedure against him. Furthermore he states that his guilt has not been established, i.e. that the NBB has not given any proof for intent, culpability, negligence or carelessness on the part of the Appellant. In the third place, the Appellant takes the position that the legal grounds of the decisions of both the Disciplinary and Disputes Commission and the NBB Committee of Appeal were incorrect. Lastly he argues that the duration of the imposed sanction is too extensive.
30. The Appellant submitted the following requests for relief:
- “1. to declare the appeal admissible.*
2. To annul the decision taken on November 8th 2017.
3. To end the suspension of Appellant”.
31. The NBB commenting and contesting the grounds of the appeal in detail holds the opinion that the decision given by the NBB Committee of Appeal was just and the punishment was appropriate; there are – in short – no reasons why the Appealed Decision should be annulled and/or why the suspension of the Appellant should be ended. At the end of its defense the NBB requires the Panel to convict the Appellant to compensate the NBB for the costs being made on its part, including the retainer paid to the CAS.

V. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

32. The NBB Articles of Association include a regulation on disciplinary violations, which is elaborated in the Regulation on Disciplinary and Dispute Proceedings of the NBB (the “Regulation”).
33. Article A.66 of the Regulation reads as follows (free translation):
- “Court of Arbitration for Sport (CAS), with seat in Lausanne (Switzerland):*
Parties which are sentenced are free to appeal to the CAS, after exhausting all legal means at the NBB”.
34. Since the Appellant followed the procedures described in this provision, he meets the criterion of Article R47 of the CAS Code. On this ground the jurisdiction of CAS can be established and is further confirmed by the Order of Procedure duly signed by the parties. Finally, the jurisdiction of CAS is not disputed by the Respondent.

35. Neither Article A.66 nor any other article of the Regulation establishes a time limit for an appeal with the CAS. In the present case, the Appellant filed his Statement of Appeal within the time limit set by Article R49 of the CAS Code. The Appeal Brief was also filed within the time limit stipulated by Article R51 of the CAS Code. Therefore, his appeal is admissible.
36. Both the Articles of Association of the NBB and the Regulation assume that Dutch law is applicable on the relations between the NBB and its members. Since the parties in this Arbitration did not make any submissions in respect of the applicable law, the Sole Arbitrator takes for granted that the parties made an implicit choice for the applicability for Dutch law in this Arbitration.
37. The following provisions of the Regulation are material to this appeal (free translation):

“Article A.1 Applicability of the Regulation

[...]

A.1.2 In this regulation only the disciplinary and dispute jurisdiction [...] by the Disciplinary and Dispute Commission of the NBB and the Committee of Appeal of the NBB is being regulated. [...].”

“Article A.11 Definition

A.11.1 As violation in the meaning of this Regulation is considered:

[...]

e. every act or omission by which the smooth running of things can be hampered or by which the interests of the NBB can be harmed, in the broadest sense of the word; [...].”

“Article A.13 Punishability

A.13.1 For punishability of violations mentioned in article 11 (of this Regulation sc.) intent or guilt and/or negligence and/or carelessness of the Defendant or Appellant are required. [...].”

VI. MERITS

38. The following are the main issues which arise in this appeal:
- (i) Did the Appellant publish the Post in the Facebook Group on or about 16 May 2017?
 - (ii) Does the Post harm the interests of the NBB pursuant to Article A.11.1(e) of the Regulation?
 - (iii) Did the NBB have jurisdiction to sanction the Appellant?

(iv) Is the sanction imposed on the Appellant proportionate?

A. Did the Appellant publish the Post in the Facebook Group on or about 16 May 2017?

39. From the very beginning of this case and in the disciplinary proceedings, the Appellant claimed that he did not put the disputed Post on the page of the Facebook Group himself; in his view, this Post must have been placed by someone who had hacked his account.
40. Since it is an established fact that the Post bears the name of “Bas van Willigen”, where it must be assumed that “Bas” is short for Bastiaan, the Appellant’s first name, it is up to the Appellant to prove that his account has been hacked and that somebody else did indeed put the Post on the page of the Facebook Group.
41. On the basis of the following considerations – separately and together – the Sole Arbitrator rejects the Appellant’s argument.
42. In the first place, the Appellant did not give a plausible explanation, did not offer witnesses, nor did he produce any other evidence to substantiate his view that somebody else hacked his account and posted the message.
43. In the second place, the Appellant only mentioned the fact that his account had been hacked without giving any detail or explanation as to how and when exactly this is supposed to have happened. As the Appellant himself is working in the IT branch, some more information in this regard could have been expected.
44. In the third place, the Appellant omits to give any indication about who could have a reason or interest to hack his account and to act as represented in paragraph 6 of this Award, and what could be the motives of such person. Furthermore, it must be noted that despite the seriousness of the allegations posted on the Appellant’s Facebook account, the Appellant did not report immediately to the police the fact that he had allegedly been the victim of a hacker. In this regard, the Appellant’s claim that he refrained from going to the police as he wanted to avoid further legal escalation is hard to believe: an immediate reaction from the Appellant when he noticed that his Facebook had allegedly been hacked could on the contrary have avoided the legal escalation which gave rise to the present proceedings. Lastly, the behaviour of the Appellant corresponds to his previous behaviour mentioned in a disciplinary case dating from 2014.
45. In the proceedings before the national disciplinary tribunals, the Appellant did elaborate on the issue of hacking in general, stating that it is very easy to hack an account. Whatever that may mean and apart from the fact that an account holder (especially someone who is working in the IT branch) must therefore take precautions to prevent such hacking, this statement is far from sufficient to substantiate or prove that his account had indeed been hacked. Furthermore, in the proceeding before the NBB Committee of Appeal, the Appellant claimed that there had been two hack-attempts of his account two days before the incriminated incident. The Appellant however did not elaborate on this issue in this arbitration procedure. Indeed, despite the Appellant’s allegations that it was “*demonstrated*” that several attempts have

been made to log in from an unknown computer on his Facebook account, and that he immediately reported these alleged attempts to Facebook, no evidence of such attempts – whether successful or not – has been filed in the present procedure. The Sole Arbitrator – referring to the deliberations of the NBB Committee of Appeal – cannot see how this circumstance can be of sufficient evidence to the view of the Appellant.

46. On the basis of these considerations, the Sole Arbitrator holds that the Appellant himself put the Post on Facebook and that, in the absence of any proof to the contrary, it must be assumed that he did so deliberately.

B. Does the Post constitute a violation of Article A.11.1 of the Regulation?

47. It shall first be noted that accusing someone from committing a criminal offense is clearly affecting this person's honour and dignity. In the present case, the Post is addressed to the U12 and U24 coach, who can be clearly identified as Mr. G. van der Hijden, especially amongst the basketball community. The Post can, given the reactions in the Facebook Group as related before, be qualified as insulting, especially since a fellow member of the NBB Mr G. van der Hijden himself deemed it necessary to file a complaint against the Appellant. Besides, by alluding to acts of sexual abuse with children, the Post is prejudicial to Mr. G. van der Hijden's honour and, as such, clearly insulting if not defamatory.
48. Since the Facebook Group contains at least 1.500 members – the NB speaks of 2.000 members – and since it did not turn out that people cannot freely join this community, it must be taken for granted that this Facebook Group is not a closed group as stated earlier by the Appellant.
49. Given these findings, the Sole Arbitrator comes to the further conclusion that the behaviour of the Appellant fits the criterion of article A.11.1 sub e of the Regulation as cited under 37.
50. In addition to the foregoing the Sole Arbitrator states that where the purpose of the NBB (according to the Articles of Association) is to practice and promote the practice of the basketball sport in the Netherlands in the broadest sense of the word, it must be assumed, given the wording "*in the broadest sense of the word*", that whenever one member of the NBB insults another member (especially when that insulted member is a NBB-coach) in front of a specific (be it on-line) audience of basketball-fans (among which junior players) the promotion of the basketball sport is "*in the broadest sense of the word*" harmed.
51. Although not explicitly repeated in his Statement of Appeal or his Appeal Brief the Appellant also argued before the NBB Committee of Appeal that Article A.11 is not applicable to him as a private person, but only when he is acting as a coach, which is not the case in a Facebook-environment and that the alleged utterances were not made "*within the NBB*". The important thing here is, that the Appellant is a member of the NBB. Whenever he comments, let alone insults, a fellow-member of the NBB (especially when that member is a fellow coach) in front of a more or less exclusive basketball audience, he is entering the circle of interests (as derived from its purpose) of the NBB; with that the Appellant is acting "*within the NBB*".

C. Did the NBB have jurisdiction to sanction the Appellant?

52. The Appellant argues that the NBB did not have jurisdiction to issue the Appealed Decision. The Appellant contends that both the NBB Disciplinary and Disputes Commission as well as the NBB Committee of Appeal only have jurisdiction to pass judgment on infringements of Article A.11 and Articles B.1 to B.5, whereas the first instance decision did not specify which violation would have been committed by the Appellant. The Appellant further contends that the publication of the Post does not constitute “*any action or failure to act*” within the meaning of Article A.11(a), (c), (d) and (f), and that the Post did not occur “within the NBB” within the meaning of Article A.11(e).
53. As explained above (see paragraphs 47-51), the Sole Arbitrator held that the Appellant did commit a violation of Article A.11.1 let. e of the Regulation. Accordingly, as is admitted by the Appellant himself, the NBB Disciplinary and Disputes Commission and then the NBB Committee of Appeal did have jurisdiction to impose sanctions on the Appellant.
54. Ex officio the Sole Arbitrator rules that neither the Articles of Association of the NBB nor the Regulation are exclusively confined to relations between the NBB on the one hand and its members on the other hand and/or to issues merely concerning matches; they also refer - given the texts of the relevant articles, which speak of hampering “*the smooth running of things in the broadest sense of the word*” - to relations of members amongst one another.
55. With that conclusion the first three grounds for Appeal are rejected.

D. Is the sanction imposed on the Appellant proportionate?

56. Remains the question – the fourth ground of Appeal – whether the sanction imposed on the Appellant was too heavy or too extensive. Indeed, the Appellant argues that other violations such as insulting a referee are punished with lighter sanctions. The sanction imposed on the Appellant would thus fail to serve its objective.
57. In considering this issue, the Sole Arbitrator notes that, in accordance with CAS jurisprudence (see, for example, CAS 2012/A/2762, applied inter alia, in CAS 2009/A/1870; CAS 2011/A/2645; CAS 2007/A/1217; CAS 2015/A/3944; CAS 2013/A/3139; CAS 2015/A/3875; CAS 2015/A/3874), he shall show restraint when reviewing the level of sanctions imposed by a disciplinary body and that the sanction imposed by that body in the exercise of its discretion can only be reviewed “*where the sanction is evidently and grossly disproportionate to the offence*”.
58. The Sole Arbitrator accepts that the principle of proportionality requires that there be a reasonable balance between the nature of the misconduct and the sanction. Each situation must be evaluated on a case-by-case basis and the interests at stake have to be balanced. “*Account must be taken of the seriousness of the facts and other related circumstances as well as of the damage that the penalised conduct entails for the parties involved, for the federation in question and for its sport. In the same way, the disciplinary bodies may evaluate any aggravating and/or extenuating circumstances that might be related to the infringement*” (CAS 2013/A/3358).

59. Taking into account the seriousness of the Post and given the recidivism of the Appellant, the Sole Arbitrator does in all reasonableness not see any reason to modify the sanction imposed by the NBB Committee of Appeal. The Sole Arbitrator notes that the Appellant does not invoke a since mitigating factor which would justify the reduction of the sanction. A reference made to a kind of violation mentioned by the Appellant's lawyer does not alter the Sole Arbitrators' decision, since this reference is in the circumstances in this case insufficiently comparable.
60. Accordingly, the Sole Arbitrator holds that the NBB Committee of Appeal did not exceed its discretionary powers and that the sanction imposed on the Appellant is not evidently disproportionate and as such is not modified by the Sole Arbitrator.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Bastiaan van Willigen against the decision of the Committee of Appeal of the Nederlandse Basketball Bond dated 8 November 2017 is dismissed.
2. The decision rendered by the Committee of Appeal of the Nederlandse Basketball Bond on 8 November 2017 is confirmed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.