



Arbitration CAS 2007/A/1427 M. v. ATP Tour Inc., award of 11 June 2008

Panel: Mr John A. Faylor (USA), President; Mr Michele A. R. Bernasconi (Switzerland); Prof. Richard H. McLaren (Canada)

Tennis

Violation of the ATP's Tennis Anti-Corruption Program

Wagering offense

Proportionality of the sanction

1. **When considering the elements for reducing a sanction in connection with a wagering offense, one has to take into consideration the following elements:**
 - the unchallenged misunderstanding of the rule by the athlete;
 - the IF's failure to properly communicate the rules to the players and to ensure the players' understanding of same;
 - the IF's inconsistency;
 - the lack of intent of the athlete;
 - the athlete's admission of the offense;
 - the athlete's cooperation to establish the nature and scope of the violation;
 - the athlete's first offense.

2. **An effective general prevention can only be achieved by imposing sanctions that are considered by the public as just and appropriate for the transgression at stake. The fact that the previous sanctions for wagering imposed significant lower term of ineligibility and lower fines is significant. The gravity of the violation and the degree of the athlete's culpability, even if deemed to be "grossly negligent", does not justify that the athlete will require (i) almost two years to work his way back up through the rankings to achieve the position which he forfeited at the time the sanction was imposed and (ii) additional financial losses, when added to the nominal amount of the fine. The age factor is also to be taken into consideration as well as the athlete's financial situation.**

The Appellant, M. ("The Appellant") was born in 1977. He has been a professional tennis player since about 1998 and a member of Division I of the ATP Tour since 1 January 2004. M. reached a career high of 68 in the ATP Singles Rankings at the beginning of 2007.

The Respondent, ATP Tour, Inc. ("ATP"), is the official international circuit of men's professional tennis tournaments. It is a non-profit membership organization under the laws of the State of Delaware (USA), the members of which are individual male tennis players and tennis tournaments.

The ATP certifies tennis tournaments and provides league governance and support to its member tournaments and players.

ATP learned through undisclosed channels that M. maintained an account with an on-line betting organisation during the period between November 2006 and July 2007. Within this time frame, M. placed approximately 120 bets involving approximately 340 ATP matches. The bets during this period totalled EUR 6,213.50. Although the bets were made on both football games and ATP matches, M. claims never to have placed bets on any of the tennis matches in which he competed.

Upon being charged with the offense, M. immediately admitted the violation and cooperated with ATP in providing the relevant documentation needed to prove the nature, type and amounts of the bets.

In his defence, M. claimed that, due to his poor English, he mistakenly assumed that the ATP prohibition on wagering related only to matches in which the player himself participated and not to betting on tennis matches in general. He asserted that he had no intention to compromise the integrity of tennis, that he wagered to pass time in a personally difficult period in which he suffered from depression and insomnia, that he placed only small stakes over the period, and had even lost money from the venture during the period.

Following a hearing held before the Anti-Corruption Hearing Officer (“**AHO**”) of the ATP Tour, Inc., Dr Peter Bratschi, on 1 November 2007, M. was declared to have violated the ATP’s Tennis Anti-Corruption Program (the “**Program**”) and, in particular, Rule 7.05 C.1.a of the 2007 ATP Official Rulebook (the “**Code**”) which sets out the “corruption offense” of wagering. The nature of the violation was deemed by the AHO to be “grossly negligent”.

ATP describes the purpose of the Program as “*to maintain the integrity of tennis and to protect against any efforts to impact improperly the rules of a match*”. Rule 7.05 C.1.a of the Code states as follows:

“C. Offenses

Commission of any offense set forth in Article C or D of this Program or any other violation of the provisions of this Program shall constitute a “Corruption Offense” for all purposes of this Program.

1. Wagering

- a) *No Player nor any of his Player Support Personnel shall, directly or indirectly, wager or attempt to wager money or anything else of value to enter into any form of financial speculation (collectively, “Wager”) on the outcome or any other aspect of any Event”.*

The penalty for a wagering offense is determined by the Anti-Corruption Hearing Officer and is punishable under Rule 7.05 G.1.a) of the Code. The penalty may include:

“With respect to any Player, (i) a fine of up to \$100,000 plus an amount equal to the value of any winnings or other amounts received by such Player or his Player Support Personnel in connection with any Wager or receipt of Consideration, (ii) ineligibility (“Ineligibility”) for participation in any competition or match at any ATP tournament, competition or other event or activity authorized or organized by the ATP (“ATP Events”) for a period of up to three (3) years and (iii) with respect to any violation of clauses (a)-(d) of Article C.2, permanent ineligibility”.

In the grounds of the Decision, the AHO cited his own doubts “*whether ATP made sure that all players understand the revised wagering rules, including the extension [to] players, coaches and family members*”. The AHO acknowledged, in addition, that the wagering Rules “*are not easy to understand even for persons with good knowledge of English*”. The AHO continued:

“ATP has not proven that it did all what the AHO considers could have and-- taking into account the importance and relevance of these rules – should have reasonably been done to duly fulfil the duty to communicate these rules to the persons subject to them”.

The AHO pointed out further in the Decision the “slight inconsistency” in the ATP’s Anti-Corruption Program. That being the anomaly of the ATP’s diligent pursuance of the fight against wagering (“not crossing the line”) and the fact that ATP tolerates that online betting companies can be sponsors of ATP Tournaments.

Citing the guiding principles for imposing the sanctions provided in the Code, the AHO discussed the two purposes of any sanction: (a) to penalize an individual for having violated the rules and to prevent him/her from repeating the offense (individual prevention) and (b) to make it clear to all other persons who observe the rules, that violations will not be tolerated and that the rules will be enforced (general prevention).

The AHO pointed out in the grounds of the Decision that where an organisation imposes a sanction on its members for reasons of general prevention, it must take into account the “individual interest and rights of the member accused”. In this regard, the AHO stated as follows:

“In fact, an effective general prevention can only be achieved by imposing sanctions that are considered by the public as just and appropriate sanction for the transgression in question. Draconian punishment on the contrary would only be seen as inhuman and as arbitrary and damage the trust in the proceeding and the court. Therefore, in order to find the appropriate sanction, reasons of general prevention cannot be considered by the judge: general prevention will be achieved by implementing a just sanction. On the contrary, an appropriate sanction must relate in the first place to the severeness of the transgression and the culpability of the transgression”.

The AHO held that, based on the facts adduced in the hearing, M. did not undertake everything that could reasonably be expected of him to obtain the necessary knowledge about the anti-corruption program.

“This is a more severe omission than that of ATP who could have done probably more to educate and inform its members and players about the program”.

Citing the fact that both the betting accounts and the bets themselves were placed openly under the player’s name, the AHO accepted M.’s claim that he had misunderstood the rule and that he had no intention to attack the integrity of the game of tennis. The fact that he made no profit in the venture was irrelevant. The fact that M. admitted the offense and cooperated with the Administrator of Rules & Competition in conducting the investigation were deemed to constitute mitigating factors.

Considering “his personal situation” and given the age of the player at 30, the AHO held that imposing the full sanction of three years ineligibility would “most likely bring to a premature end his career as a tennis professional”.

In his Decision of 9 November 2007, the AHO concluded that a rule violation had occurred “in a gross negligent way” and declared a sanction of nine months ineligibility and a fine of USD 60,000 as being “a legally justified and appropriate sanction”.

On 29 November 2007, M. filed a Statement of Appeal (Rule 7.05 H. 3) of the ATP Code) to the Court of Arbitration for Sport (**CAS**) which contained the following petition:

“to adopt an award declaring the nullification of the said decision adopting a new decision in which no sanction of ineligibility is taken (or a significant reduction of the period of ineligibility is granted) and only a fine is fixed to be paid by the appellant: the amount of the fine must also be reduced”.

Having admitted the violation and his personal culpability for having misunderstood “the real content of the anti-corruption rules”, M. requests only consideration of the penalty. In his view, the sanction is excessive when compared with the severity of his misconduct.

In his Appeal Brief received by CAS on 11 December 2007, M. cites mitigating factors which warrant a reduction of the sanction.

ATP filed its Answer on 7 January 2008 with CAS.

ATP describes its Tennis Anti-Corruption Program as designed “to maintain the integrity of tennis and to protect against any efforts to impact improperly the results of any match”. The Program is supported by ATP’s players and tournament members.

A hearing of the matter was held before the CAS Panel on 24 April 2008 in Lausanne.

LAW

Jurisdiction of the CAS

1. The jurisdiction of the CAS to act as an appeal body is based upon art. R47 of the Code of Sports-related Arbitration in the version in force as of January 2004 (the “CAS Code”) which provides that

“A party may appeal from the decision of a federation, association or sports body, 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 body”.

2. Rule 7.05 H. 2) of the 2007 ATP Official Rulebook provides as follows:
“Any Decision (i) that a Corruption Offense has been committed, (ii) that no Corruption Offense has been committed, (iii) imposing Consequences for a Corruption Offense, (iv) regarding the scope of a Demand, and/or (v) that the AHO or ATP lacks jurisdiction to rule on an alleged Corruption Offense or its Consequences, may be appealed exclusively to the Court of Arbitration for Sport (“CAS”) in accordance with CAS’s rules relating to Appeal Arbitration Hearings, by either: (a) the Player (or Player Support Personnel) who is the subject of the Decision being appealed or (b) by the ATP”.
3. The jurisdiction of the CAS has been explicitly recognised by the parties in the Order of Procedure which they signed prior to the hearing, and which was confirmed again in the hearing on 24 April 2008.
4. Under art. R57 of the CAS Code, the Panel has full power to review the facts and the law. The Panel accepts the Appellant’s admission of the violation and his personal culpability. It, therefore, restricts its review to the measure of the sanction (see para. 3.1 above).

Admissibility of the appeal

5. M. was notified by ATP of the Decision on 12 November 2007. On 29 November 2007, i.e., within the deadline of 20 business days from the date of receipt, M. filed a timely Statement of Appeal to the Court of Arbitration for Sport (CAS).
6. Consequently, the appeal is admissible.

Applicable law

7. Art. R58 of the CAS Code provides:
“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 choice, according to the law of the country in which the federation, association or sports 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”.
8. The “applicable regulation” in this dispute involving the Anti-Corruption Program of the ATP is Rule 7.05 I. 3) which provides:
“This Program shall be governed in all respects (including, but not limited to, matters concerning the arbitrability of disputes) by the laws of the State of Delaware without reference to Delaware conflict of laws principles”.

The Merits of the Appeal

9. Rule 7.05 G. 1) a) of the ATP Code lays down the framework for sanctioning violations of the Tennis Anti-Corruption Program. Within this framework, the AHO has wide latitude for setting the measure of the penalty. However, the provision provides no criteria for identifying and evaluating “aggravating” or “mitigating” circumstances.
10. In the case at hand, the AHO chose not to impose the maximum term of ineligibility of “up to three (3) years” or the maximum fine of “up to \$ 100,000”. Instead, he substantially reduced the ineligibility by 2 years and 3 months to 9 months and the amount of the fine by US\$ 40,000 to US\$ 60,000, taking into consideration a number of mitigating circumstances.
11. In considering the AHO’s reasoning for reducing the sanctions, the AHO accepted the Appellant’s defence that he “misunderstood the rule in question”. If the Appellant had known that gambling on any tennis match, regardless of whether he plays in it or not, could result in severe penalties, it is unlikely that he would have opened an online betting account and placed bets on that account using his own name. While not wishing to conjecture on how the consequences of a severe penalty may or may not have affected M.’s behavior, the Panel sees no cause to challenge the AHO’s assumption on this point.
12. With regard to the Appellant’s “misunderstanding” of the rules, the AHO spares no criticism in pointing out that the ATP did not do all that it could do or should have reasonably done to communicate the rules to the players and to ensure the players’ understanding of same. The Panel notes that ATP takes issue with the AHO’s criticism, citing the numerous publications (Player News, PlayerZone, Player’s Weekly and the ATP’s website) in which information regarding the rules had been published.
13. The Panel renders no comment on the effectiveness of the publications and other media used by the ATP to provide information on the Anti-Corruption Rules to its members and players, but does suggest that ATP consider whether communication and understanding of Rules could be enhanced if these were to be published in several other languages, in addition to English. Mr Bradshaw stated in his testimony before the AHO that the Rules are published “in English only” in the internet and that only a Spanish edition of “Players’ Weekly” exists.
14. Moreover, the AHO’s ironic use of the term “slight inconsistency” in describing the ATP’s dogmatic (“don’t cross the line”) position on wagering while, at the same time, tolerating the advertising of online betting companies as sponsors of ATP Tournaments is not unjustified. The Panel shares the AHO’s reservations regarding the appropriateness of such advertising if the ATP intends to stringently enforce its Anti-Corruption Program in the interests of the integrity of the sport of tennis.
15. In granting the reduction of the sanctions, however, the AHO is careful to emphasize that “a professional player *must* know the Code”. A player cannot follow the rules that suit him and disregard the rest. To this extent, even the fact that the Appellant is exposed to online betting

advertisements both on and around the tennis court cannot, in any manner, act to mitigate the sanction. The Panel can only underscore the AHO's position on this point.

16. The AHO, like any adjudicator, was compelled to engage in a "weighing" of the merits.
"The Hearing has shown that the PLAYER did not undertake everything that can reasonably be expected of him to get the necessary knowledge about the anti-corruption program. This is a more severe omission than that of ATP who could have done probably more to educate and inform its members and players about the program".
17. Based on this evaluation, the AHO concludes that the Player, although having acted with gross negligence, did not act with intent: *"The Player had not in mind to attack the integrity of tennis"*. This conclusion is supported, according to the AHO, by the fact that the Appellant also bet on football, placed only "small stakes" and was seeking diversion during times of depression and insomnia. The Panel finds no cause to challenge the reasoning of the AHO in drawing this conclusion.
18. A further mitigating factor, in the view of the AHO which is supported by the Panel, is the fact that the Appellant admitted from day one that he committed the offense and actively cooperated with the ARC's investigation to establish the nature and scope of the violation.
19. Accordingly, the Panel does not share the view of the Appellant that the AHO did not give due consideration to the facts which he cited on page 5 of the Appeal Brief, namely that this violation is the Appellant's first offense, that he immediately admitted the violation, that he had no intention of breaking the rules and no intention of impairing the integrity of the game. The AHO touched upon all of these points, at least inferentially, in the reasoning of the Decision. If the current offense were not the Appellant's first offense, he would be facing a lifetime sentence.
20. Notwithstanding the Panel's unlimited power to review the facts and the law applicable to this case, it only reservedly wishes to substitute its evaluation of the facts and circumstances of the case for that of the AHO. The AHO is closer to the sport of tennis than this CAS Panel and can better assess the interests and values of the ATP in the face of the violation which has been committed.
21. Having said this, however, the Panel wishes to repeat an extract from the Decision which demonstrates the AHO's cogent understanding of the interdependency between the terms "individual prevention" and "general prevention", but which also forms the basis for the Panel's considerations regarding the impact of the sanctions upon the Appellant.
"In fact, an effective general prevention can only be achieved by imposing sanctions that are considered by the public as just and appropriate sanctions for the transgression in question..... Therefore, in order to find the appropriate sanction, reasons of general prevention cannot be considered by the judge: general prevention will be achieved by implementing a just sanction".
22. In this regard, the Panel has noted the disclosures made in the hearing by the ARC, Mr. Bradshaw, regarding the sanctions imposed on other players for wagering following the

AHO's decision of 9 November 2007. In answer to the Panel's question, Mr. Bradshaw cited a litany of at least 6 penalties, all of which imposed significantly lower terms of ineligibility, none of which exceeded 6 months. In one case, in which the player wagered on one of his own matches, the penalty was placed at 100 days.

23. In addition to declaring the offenders ineligible for varying periods, the ATP also imposed fines which ranged from US\$20,000 to US\$50,000. In the case in which the player was declared ineligible for a period of 100 days, he also received a US\$35,000 fine.
24. The Panel notes with concern that ATP made no reference to the existence of these subsequent sanctions in its written answer to the appeal. While cognizant of the fact that details were not disclosed regarding these subsequent violations, the Panel finds it nonetheless disconcerting that the level of the sanctions imposed lies substantially lower than the sanctions imposed upon M.
25. In response to the Panel's question as to why the player who bet on the outcome of his own match received only a 100 day period of ineligibility and a US\$ 35,000 fine, ATP responded that the player stopped wagering of his own accord, the wagering was of short duration and had ended a long time ago. No further clarification was provided by ATP in response to the Panel's and the Appellant's questions regarding these subsequent sanctions other than that "the circumstances of these cases were different".
26. A further factor which causes the Panel concern in assessing the measure of the sanction in the instant case is the fact that the nine month term of the Appellant's ineligibility, which commenced upon notification of the AHO's Decision to the Appellant on 12 November 2007, will expire at midnight on 12 August 2008.
27. Tennis is a sport which uses points earned over a calendar year to determine rankings which, in turn, affect entries to other tournaments. As at the date of the hearing, it was determined that the Appellant was placed at 240 in the ATP Singles Rankings, but could slip to a position in an even lower 100 bracket upon expiration of his ineligibility period in August 2008.
28. The Panel questions whether the AHO fully took into account the Appellant's rapid loss in ranking during the 9 month term and the time needed to return to his former level of play. The 2008 tennis season winds down after the U.S. Open in late August, although Shanghai remains on the docket. Assuming that the Appellant remains barred until mid-August 2008, it is inconceivable that he will regain any portion of his lost rankings until well into the 2009 season. The 2008 season will have passed.
29. In the view of the Panel, the gravity of the violation at hand and the degree of the Appellant's culpability, even if deemed to be "grossly negligent" by the AHO, does not justify that the player will require almost two years to work his way back up through the rankings to achieve the position which he forfeited at the time the sanction was imposed. Moreover, his ability to return to the "top 100" will be increasingly influenced by his age. The Appellant will reach 31 years of age shortly before the nine month term of eligibility expires.

30. Lastly, notwithstanding the absence of any earnings during the term of his ineligibility, the Appellant's financial situation will also be impacted negatively during his climb back up the rankings. These additional financial losses, when added to the nominal amount of the fine, stand in sharp disproportion to the gravity of the offense and the degree of the Appellant's fault.
31. General prevention, in the words of the AHO, is best achieved by imposing a just (individual) sanction. If the term of ineligibility and the amount of the fine are not reduced, the punishment imposed upon the Appellant places the proportionality of the sanction in question and vitiates the preventive purposes which it intends to achieve. For this reason, the Panel deems that a reduction of the term from nine (9) months to seven (7) months is fair and appropriate.

The Court of Arbitration for Sport rules:

1. The appeal filed by M. is partially granted.
 2. The decision of the Anti-Corruption Hearing Officer of the ATP Tour, Inc. of 9 November 2007 is modified as follows:
 - (a) The term of ineligibility pronounced by the Anti-Corruption Hearing Officer is reduced from nine (9) months to seven (7) months.
 - (b) The fine imposed by the Anti-Corruption Hearing Officer is reduced from US\$60,000 to US\$25,000.
- (...).