



Arbitration CAS 2008/A/1500 Denis Roberts v. Fédération Internationale des Luttes Associés (FILA), award of 19 January 2009

Panel: Prof. Luigi Fumagalli (Italy), President; Mr Alan Sullivan QC (Australia); Mr Clifford Hendel (USA)

Wrestling

Doping (amphetamine)

Validity of a TUE delivered by a national federation

CAS power of review

Publication of a provisional suspension

Apology as a remedy for damages

- 1. According to the applicable regulation of FILA, an athlete who is not registered on the International Federation's Registered Testing Pool (RTP) and who is not competing at an international event is not required to possess a Therapeutic Use Exemption (TUE) approved by the International Federation (IF). A TUE granted by the national federation is valid as long as a national event is concerned.**
- 2. Claims for consequential remedies are not in principle excluded in the framework of appeals proceedings. To the extent an appellant challenges a decision rendered by a sports-related body, no limits are *per se* imposed by the CAS Code to the relief that can be requested by the appellant (see Article R48 of the Code) and granted by the panel. Article R57 of the Code, in fact, meaningfully allows the panel to decide the dispute *de novo*, directly considering the facts and the law, and does not reduce its powers to the mere setting aside of the challenged decision.**
- 3. Disclosing on its website the provisional suspension of an athlete prior to the determination in a hearing that an antidoping rule violation has occurred, constitutes a breach by the IF of its antidoping rules and an illegal publication.**
- 4. Under Swiss law, the conditions for the issuance on an IF's website of an apology as a remedy for damages caused to one's personality is only allowed for grave and lasting infringements.**

Mr Denis Roberts ("Mr Roberts" or the "Appellant") is a wrestler of Australian nationality born on 8 December 1980. Mr Roberts is registered with the Australian Wrestling Union (AWU).

The Fédération Internationale des Luttes Associées (FILA or the “Respondent”) is the international federation of associated wrestling styles. It exercises regulatory and supervisory functions over national wrestling associations, worldwide. FILA is an association under Swiss law and has its headquarters in Corsier-sur-Vevey (Switzerland).

Mr Roberts is an athlete suffering from Attention Deficit Disorder, disease requiring treatment with “dexamphetamine”, which is a prohibited substance under anti-doping regulations applicable in the sport of wrestling.

In order to be allowed to compete while taking the medication to treat his disease, Mr Roberts applied for a therapeutic use exemption (hereinafter referred to as “TUE”) with the competent authorities.

On 4 April 2007 the Australian Sports Drug Medication Advisory Committee (ASDMAC) granted Mr Roberts a TUE (the “ASDMAC TUE”) relating to “dexamphetamine” valid until 30 March 2008.

In the letter of 4 April 2007 confirming the granting of the ASDMAC TUE, ASDMAC made it clear to Mr Roberts that *“approval for the use of a prohibited substance does not preclude you from being selected for a drug test or from declaring the use of the prohibited substance ...”*, and that *“when competing in International Sports Federation (ISF) sanctioned events either in Australia or overseas, you will need to approach the ISF to determine if the approval provided by the ASDMAC is valid for continued use of the substance during competition or valid under the ISF rules”*.

On 18 April 2007 Mr Roberts applied, through the AWU, to FILA for the issuance by it of a TUE to compete in international events. The applications had the ASDMAC TUE attached.

On 23 April 2007 FILA acknowledged the receipt of Mr Roberts’ application and of the ASDMAC TUE. In this respect FILA underlined *“that this authorization [the ASDMAC TUE] is valid only for National competitions but not for International competitions supervised by FILA which are included in FILA official calendar”*. Later that date, however, FILA informed AWU that Mr Roberts’ application for the issuance of a TUE by FILA had been denied because *“this case is not complying with articles 4.2, 4.3 and 4.4 stipulating the criteria for granting a TUE, because this athlete would not suffer any prejudice for his health without this treatment. Moreover, the use of this substance will induce an improvement of his sporting performance and a therapeutical alternative does exist”*. The AWU thereupon informed Mr Roberts of such decision, noting that the denial means that *“you are unable to take the medication whilst competing in FILA competitions but can during Australian competitions”*.

The decision of FILA was communicated to Mr Roberts by AWU on 30 April 2007.

On 8 December 2007, whilst competing in Canberra, Australia, in the “2007 Wrestling Qualification Tournament”, an event sanctioned and run by the AWU and not an international event conducted by FILA, Mr Roberts underwent a doping control conducted by the Australian Sports Anti-Doping Authority (ASADA). In the doping control form Mr Roberts quoted the approval number of his ASDMAC TUE.

The analysis report relating to the sample provided by Mr Roberts, issued on 10 January 2008, confirmed the presence of amphetamine.

Following a request made on 16 January 2008 by ASADA, ASDMAC confirmed, on the same date, that Mr Roberts had an ASDMAC TUE for amphetamine.

By facsimile dated 17 January 2007 FILA, having received the ASADA document reporting an adverse analytical finding (above), requested ASADA to be informed of the name of the athlete concerned, his level (national or international) and *“the name and place of the national competition involved”*.

In an undated letter to FILA, ASADA answered such request, indicating that the athlete in question was Mr Roberts, that the event at which he was tested was the “2007 wrestling qualifications tournament Rd3” held in Canberra, and advising that *“ASDMAC have confirmed that they hold a current TUE for this athlete, so no further action will be taken in this case”*. It is unclear whether this letter was received by FILA before being re-sent as described below.

In fact, on 6 February 2008, AWU, replying to a further FILA request for information, wrote to FILA stating that the name of the athlete involved had not been disclosed by ASADA, but that ASADA had advised that such athlete had a valid and applicable ASDMAC TUE.

In an e-mail to the World Anti-Doping Agency (WADA), on 7 February 2008, FILA reiterated that it absolutely needed the information about the athlete in advance of the Oceania Championship in Canberra which was to commence on 8 February 2008, and stated that *“ASADA is claiming that this athlete obtained a TUE, but according to the FILA Doctor, Head of our TUE Committee, it is not possible to grant a TUE for this kind of substance on the international level”*.

On 7 February 2007, therefore, ASADA sent to FILA another letter, transmitting the documentation it had already attempted to send, and confirming that no action would be taken against the athlete holding the ASDMAC TUE. Receipt of this correspondence was acknowledged on the same day by FILA.

On 8 February 2008 FILA, in a letter signed by its President and by its Secretary General, answered ASADA, and issued a decision (the “Decision”) as follows:

“The wrestler Denis Roberts (AUS) is suspended on a provisional basis as from 8th December 2007 from participating in any National or International Competition until the final decision of the FILA Sporting Judge”.

In support of such Decision, FILA stated the following:

“According article 2.0 Code Provisions – article 4.4 of the Code – Therapeutic Use – when an international-level athlete is concerned, the competence to grant a TUE belongs to the International Federation.

As you can read, an application was made to the FILA TUE Commission by Mr Roberts on 23rd April 2007 and this application was refused by the FILA Doctor on view of the application file and the reasons of the refusal were: “this case is not complying with articles 4.2, 4.3 and 4.4 stipulating the criteria for granting a TUE, because this athlete would not suffer any prejudice for his health without this treatment. Moreover, the use of this substance will induce an improvement of his sporting performance and a therapeutical alternative does exist”.

According to the same article 4.4 the competent body to reverse the FILA's decision is WADA, which must justify to the International Federation the reasons for challenging the refusal. This was not done by WADA.

FILA considers this wrestler as guilty of doping and is requesting ASADA which broke FILA's decision, which was in compliance with was [sic] is mentioned in the Code, to propose a sanction for this wrestler.

This damage to FILA's authority is very serious as this wrestler has been entered by his National Federation to participate in the qualifying event for the Beijing Olympic Games, which means the 2008 Oceania Championship in Canberra, Australia which will take place from 8th to 10th February 2008".

The Decision appears to have been published on 8 February 2008 on the FILA website in the "List of suspended wrestlers".

The Decision was communicated by AWU to Mr Roberts by e-mail on 12 February 2008.

In a letter dated 18 February 2008 ASADA expressed to FILA its position with respect to the Decision as follows:

"Denis Roberts was tested on 8 December 2007 at an event in Canberra, Australia. It appears the event was run by the Australian Wrestling Union (AWU) and was not supervised by FILA. The event also does not appear on the FILA 2007 Official Calendar (as published on FILA's website, a copy of which is attached). Given this, our understanding is that this event is a 'national' competition event and therefore the athlete was competing at a national level.

We note clause 4.4.2 of your Anti-Doping Policy which requires wrestlers who are included in FILA's Registered Testing Pool (RTP) or those who participate at international events to obtain a TUE from FILA. It does not appear that the athlete was competing at an international event. Furthermore, our search of FILA's RTP for 2007 and 2008 (as published on FILA's website) does not identify the athlete as being within FILA's RTP. Further, as Mr Roberts is not on your RTP and was not competing at an International Event, we do not believe that he was required to possess a TUE approved by FILA for the purposes of competing at the 8/12/07 event. The Australian TUEC (ASDMAC) has granted this athlete a TUE for national level competition. In accordance with Article 15.4 on page 48 of FILA's policy, FILA recognises TUEs granted by ASDMAC. We refer to the e-mail from you dated 23 April 2007 (copy attached) which suggests that FILA recognised the validity of the TUE granted by ASDMAC in so far as it related to national competitions. As Mr Roberts has a valid TUE for Amphetamines (specifically, dexamphetamine) ASADA does not believe that this matter should be taken further.

In conclusion, ASADA is of the view that Mr Roberts:

- *competed in a 'national' level competition on 8 December 2007;*
- *is not on FILA's RTP for 2007 and 2008 (as published on FILA's website);*
- *does not require a FILA TUE for a national level competition;*
- *has a valid TUE from ASDMAC for 'national' level competitions;*
- *does not have a case to answer in relation to his sample of 8 December 2007".*

In a letter of 19 February 2008, ASADA stated the above position also to WADA, noting that the provisional suspension appeared to have been imposed without a hearing, which (together with the

publication of the details on the FILA website) may have violated Mr Robert's rights, and FILA's obligations, under the FILA Anti-Doping Regulations the "FILA ADR", November 2006).

On 19 February 2008, then, Mr Roberts directly addressed FILA, "*requesting that you immediately advise me of the date of my expedited hearing*", pursuant to Article 8.1 of the FILA ADR, and asking that his name be removed from FILA's website.

On 29 February 2008 the Appellant filed, by means of an Application Form, a statement of appeal with the Court of Arbitration for Sport (CAS), at its Oceania Registry, pursuant to the Code of Sports-related Arbitration (the "Code"), to challenge the Decision. With the statement of appeal Mr Roberts requested the following relief:

- (a) *set aside the decision of FILA, contained in its letter to ASADA dated 8 February 2008, to impose a preliminary suspension on Mr Roberts;*
- (b) *to the extent that FILA has determined that Mr Roberts has committed a breach of the FILA Anti-Doping Regulations, set aside that decision;*
- (c) *declare that the public disclosure by FILA on its website of its decision to impose a preliminary suspension on Mr Roberts is breach by FILA of Article 14.4 of the FILA Anti-Doping Regulations;*
- (d) *direct that FILA immediately remove from its website all information concerning the preliminary suspension of Mr Roberts and in a prominent position on its website prove [sic] a public apology to Mr Roberts; and*
- (e) *that FILA pay the legal and other costs of Mr Roberts on a full indemnity basis".*

The same statement of appeal contained a request for the stay of execution of the Decision.

On 14 March 2008, the Appellant filed his appeal brief, no longer seeking (for the reasons set out in 28 below) that the Decision itself be set aside, and seeking, in addition to the indemnification for his legal expenses, "*that the Panel should:*

- (a) *declare that the conduct of FILA in disclosing on its website the provisional suspension breached 14.4 of the FILA Anti-Doping Regulations;*
- (b) *order FILA to publish on its website an apology to the appellant in which FILA:*
 - (i) *acknowledges that it had no proper legal basis to impose a provisional or other suspension on the appellant;*
 - (ii) *acknowledges that the appellant has complied fully with his obligations under the FILA Anti-Doping Regulations;*
 - (iii) *acknowledges that it was in breach of the FILA Anti-Doping Regulations in disclosing on its website details of the provisional suspension; and*
 - (iv) *apologises to the appellant for the hurt and damage caused by the unlawful disclosure".*

In support of his request for relief, as specified in the appeal brief, the Appellant explains *inter alia* that, after he had, on 29 February 2008, filed the appeal with the CAS and sent a letter to FILA,

- i. *“the reference to the provisional suspension of the appellant was no longer on the website when it was reviewed that weekend”*, i.e. the weekend of March 1-2, 2008;
- ii. FILA received a letter dated 4 March 2008 from WADA indicating that FILA’s decision to provisionally suspend Mr Roberts *“has in our opinion no legal basis”*, because Mr Roberts was not included in the FILA registered testing pool and accordingly was not an international-level athlete, the Canberra event in which he had been tested was a national-level event and Mr Roberts had a valid and applicable ASDMAC (i.e., national) TUE. In addition, WADA had indicated that the Decision seemed to have been *“rendered in violation of the athlete’s right to be heard”*, and that FILA could not simply overrule a decision not to prosecute an athlete of a national level in a national case, but that it had the possibility to challenge such decision in accordance with the FILA ADR;
- iii. FILA decided by letter of 6 March 2008 to revoke (literally, “cancel”) the Decision and the provisional suspension thereby imposed, although it indicated its view that Mr. Roberts was an international wrestler and that the Decision was issued strictly in accordance with FILA rules.

The Appellant, accordingly, emphasizes that FILA, notwithstanding the withdrawal of the Decision, has refused to concede that it had acted in breach of the FILA ADR and to pay the Appellant the costs he has sustained in respect of the arbitration and to apologize for its conduct in disclosing the provisional suspension on its website. As a result, the Appellant maintains that he is entitled to the relief, as modified, that he seeks.

On 1 April 2008 FILA filed its answer, disputing the requests submitted to the CAS by Mr Roberts.

In its answer, the Respondent preliminarily notes that *“Mr Roberts is an international wrestler”* and *“was therefore submitted [sic] to apply for a TUE, to be granted by FILA, in order to participate in international competitions”*. At the same time, FILA acknowledges that ASDMAC, by issuing the ASDMAC TUE, had authorized Mr Roberts to participate in national competitions, and that Mr Roberts had tested positive while participating in a national competition.

However, FILA emphasizes that

- i. on 8 February 2008 Mr Roberts was about to compete in an international competition (the 2008 Oceania Championship) and that *“in view of preserving the integrity of the results of the competition, the person in charge of doping matters at the FILA decided that it was not possible to follow the procedure within the time allowed and for this reason it was decided to impose a provisional suspension to this wrestler as a preventative measure. This provision is stipulated in our Regulations and is in compliance with what is done in similar cases”*;
- ii. *“after the end of the competition ... the provisional suspension was cancelled by our letter dated 6th March 2008, with a warning to Mr Roberts to apply for a TUE from FILA in order to be allowed to participate in the next competitions”*;
- iii. *“FILA did not cause to Mr Roberts any harm”*.

Additionally, FILA submits that *“in any case, Mr Roberts should have applied to the FILA Federal Appeal Commission prior to his appeal to CAS”*.

In a letter dated 24 October 2008 the CAS Court Office informed the parties that the Panel, having noted the FILA’s statement that Mr Roberts had not exhausted the internal remedies available to him prior to the appeal, had decided to request the filing of additional submissions with respect to the issues of jurisdiction of CAS and admissibility of the claim.

On 12 November 2008 the Appellant filed his “Further Submission”, confirming his position that “CAS has clear jurisdiction to hear the appeal” and expressing the reasons supporting it.

On 24 November 2008 the Respondent filed the *“Respondent’s Submission (Jurisdiction and Admissibility of Claims)”*. In its submissions, the Respondent declared that it had decided not to challenge (any longer) the jurisdiction of CAS.

By letters of various dates the parties agreed that a decision could be rendered by the Panel without a hearing. Therefore, in accordance with Article R57 of the Code, the Panel decided not to hold a hearing in this case.

LAW

Appeal Proceedings

1. As these proceedings involved an appeal against a disciplinary decision issued by a federation (FILA), they are considered and treated as appeal arbitration proceedings in a disciplinary case of international nature, in the meaning and for the purposes of the Code.

Jurisdiction and Admissibility

2. The jurisdiction of CAS to render an award on the appeal is based by the Appellant on Article 13.2 of the FILA ADR.
3. An issue, however, arose in these proceedings with respect to the actual existence of jurisdiction and on the admissibility of the appeal brought by Mr Roberts against the Decision. In its answer dated 1 April 2008, in fact, FILA observed, in a rather laconic expression, that *“Mr Roberts should have applied to the FILA Federal Appeal Commission prior to his appeal to CAS”*. In this way, FILA appeared to raise an objection, based on the non-exhaustion of internal remedies by Mr Roberts, since Article R47 of the Code expressly provides that *“an appeal against the decision of a federation ... may be filed with the CAS ... 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”*.

4. In its Submissions dated 24 November 2008 (above), however, the Respondent declared that it had decided not to challenge (any longer) the jurisdiction of CAS.
5. The Panel welcomes this thoughtful decision by the Respondent, which indeed significantly contributes to a prompt resolution, in the CAS forum, of a sports-related dispute between the parties. The Respondent's position, in fact, allows the Panel to avoid expounding on a thorny issue, which was raising much doubts.
6. A point remains however open, at least with respect to one of the remedies sought by the Appellant. The Respondent, in fact, while conceding jurisdiction on the appeal, contends that the claim for an apology is not admissible in CAS appellate procedure, "*the object of which shall be limited to the setting aside or revision of a decision*".
7. The Panel notes that claims for consequential remedies are not in principle excluded in the framework of appeals proceedings. To the extent an appellant challenges a decision rendered by a sports-related body, no limits are *per se* imposed by the Code to the relief that can be requested by the appellant (see Article R48 of the Code) and granted by the panel. Article R57 of the Code, in fact, meaningfully allows the panel to decide the dispute *de novo*, directly considering the facts and the law, and does not reduce its powers to the mere setting aside of the challenged decision. In addition, the Panel has been able to trace at least one precedent (award of 14 February 1996, CAS 95/142, in REEB (ed.), *Digest of CAS Awards (1986-1998)*, Bern, 1998, p. 225, §§ 40-67), in which a CAS panel, hearing an appeal, considered the merits, without questioning the admissibility, of a claim for damages caused by the challenged decision.
8. At the same time, the Panel underlines that limits to its jurisdiction to hear a request for consequential remedies could however derive from the relevant arbitration clause, but remarks that FILA has not clearly limited its decision to accept this Panel's jurisdiction only to a portion of the claims put forward by the Appellant: FILA in fact declared in an unqualified way that it "*shall not challenge the jurisdiction of CAS*".
9. The Panel however finds that the issue of the admissibility of the request for an apology can, at this preliminary stage of the reasoning, be left open, since it deserves further analysis in the context of the evaluation of its merits and combined with it. The law applicable to the dispute, in fact, is also to be taken into account for the determination of the power of the Panel to grant a remedy requested by the party.
10. The Panel therefore confirms its jurisdiction to hear the appeal brought by Mr Roberts, as being no longer disputed and acknowledged by the Order of Procedure duly signed by the Parties. Further analysis, however, is conducted hereinafter (below) on the admissibility of the Appellant's request for a decision by the Panel ordering the Respondent to publish an apology to the Appellant.

Applicable Law

11. Pursuant to Article R58 of the Code, the Panel is required to 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”.
12. In this case, consequently, the FILA rules and regulations fall to be applied primarily, with Swiss law applying subsidiarily.

The Merits of the Dispute

A. *The Remedies requested by Mr Roberts*

13. The Appellant is requesting in this arbitration, following his appeal brief, three remedies:
 - i. an award declaring that the conduct of FILA in disclosing on its website the provisional suspension of Mr Roberts breached Article 14.4 of the FILA ADR;
 - ii. an award ordering *“FILA to publish on its website an apology to the appellant”*; and
 - iii. an award ordering FILA to pay the legal and other costs of Mr Roberts *“on a full indemnity basis”*.
14. The requests for relief originally contained in the statement of appeal were in fact modified by the Appellant following the revocation of the Decision by FILA on 6 March 2008.
15. The Appellant’s claims are challenged by FILA, that
 - i. defends the lawfulness of the Decision,
 - ii. contends that the request for publication of an apology is not admissible, and
 - iii. submits that the Appellant should not be awarded any costs.

B. *Declaratory Judgment*

16. The first request is for a declaratory award concerning a breach of the FILA ADR allegedly consisting in the illegal publication in the FILA’s website of the provisional suspension imposed by the Decision.
17. Article 14.4 [*“Public Disclosure”*] of the FILA ADR provides:
“Neither FILA nor its National Federation shall publicly identify Wrestlers whose Samples have resulted in Adverse Analytical Findings, or who were alleged to have violated other Articles of this Anti-Doping Regulations until it has been determined in a hearing in accordance with Article 8 that an anti-doping rule violation has

occurred, or such hearing has been waived, or the assertion of an anti-doping rule violation has not been timely challenged. Once a violation of these Anti-Doping Rules has been established, it shall be publicly reported within 20 days”.

18. The Panel notes that the provisional suspension of Mr Roberts was published on 8 February 2008 on the website of FILA. The name of Mr Roberts was inserted in the list of the wrestlers suspended for a doping offence. Such publication clearly occurred prior to the determination in a hearing, or even in a “provisional” hearing conducted pursuant to Article 7.4 of the FILA ADR, that an anti-doping rule violation had occurred. Indeed, at the time the Decision was rendered, ASADA had expressly determined that no further action was going to be taken against Mr Roberts. At best, therefore, the responsibility of Mr Roberts, when his name was publicly identified, was disputed. In addition, the publication in the website does not appear to the Panel to be a necessary means for the achievement of the purpose that FILA declares was sought by the Decision, i.e. to prevent Mr Roberts from competing in the 2008 Oceania Championship on 9 February 2008. In fact, Mr Roberts participated all the same in that competition, and the result sought by FILA could be achieved in other, more confidential, ways.
19. In light of the foregoing, the Panel declares that FILA, in disclosing on its website the provisional suspension of Mr Roberts, breached Article 14.4 of the FILA ADR.

C. *Apology*

20. The second request of the Appellant is for an award ordering FILA to publish on its website an apology, as a remedy to the prejudice to Mr Roberts’ reputation allegedly caused by the publication in the FILA’s website of the provisional suspension imposed by the Decision.
21. The Panel, while having the power to render such an order, finds that the conditions for its issuance, as stipulated in Swiss law, are not met, and therefore that the order requested cannot be issued.
22. Under Swiss law, compensation, or another form of remedy, for damages caused to one’s personality is allowed (see Article 28 and Article 28a of the Swiss Civil Code), but only for grave and lasting infringements (CAS award of 14 February 1996, CAS 95/142, in REEB (ed.), *Digest of CAS Awards (1986-1998)*, Bern, 1998, p. 225, § 58).
23. Article 49 of the Swiss Code of Obligations, in fact, so provides:
“Where individual inherent rights are unlawfully injured, the damaged person may claim the payment of a sum of money as compensation for the damage sustained, when the seriousness of the injury justifies it and the injury has not been compensated otherwise.
²*The judge can substitute for, or add to, this indemnity another form of remedy”.*
24. The Panel notes that, although the provisional suspension of Mr Roberts was published in the FILA’s website contrary to Article 14.4 of the FILA ADR, the infringement cannot be established to be sufficiently grave and lasting. Indeed, the information concerning the

suspension of Mr Roberts expressly mentioned its provisional nature and was publicly accessible, appearing on the website, for a maximum of three weeks (above). In addition, the Appellant has not proven that this led to lasting negative image: it apparently did not even interfere with the Appellant's ability to compete.

25. As a result, the Panel dismisses Mr Roberts' request that FILA be ordered to publish an apology.

Conclusion

26. In light of the foregoing, the Panel partially grants the relief requested by Mr Roberts: it declares that the publication on FILA's website of Mr Roberts' provisional suspension breached Article 14.4 of FILA ADR, and grants Mr Roberts a contribution towards his costs, but dismisses the request that FILA be ordered to publish on its website an apology to the Appellant.

The Court of Arbitration for Sport rules:

1. The requests for relief sought by Mr Denis Roberts are partially granted.
2. The Panel declares that the publication by the Fédération Internationale des Lutttes Associés in its website of Mr Roberts' provisional suspension breached Article 14.4 of the FILA Anti-Doping Rules.
3. (...).
4. All other prayers for relief are dismissed.