Case 22 – Presence of Prohibited Substance

Key Words

Contamination; Metabolite; Steroid; Article 10.4 No Fault or Negligence UKA; Article 40.5(a); Mountain Fuel; Presence; lex mitior; World Anti-Doping Code 2015; Article 10.5.1; Supplement; Doping

Summary

Athletes H and T were both charged with an Article 32.2(a) Anti-Doping Rule Violation (ADRV) of the UK Athletics (UKA) Anti-Doping Rules following an Adverse Analytical Finding (AAF) for the presence of two Prohibited Substances; i) a Metabolite of a substance similar to an anabolic steroid; and ii) a Metabolite of an exogenous anabolic steroid. The case was referred to the National Anti-Doping Panel for resolution under the Anti-Doping Rules of UKA. The Tribunal found that both athletes could rely, in mitigation, on Article 40.5(b) UKA Anti-Doping Rules, the equivalent of Article 10.5.2 of the World Anti-Doping Code (WADC) (no Significant Fault or Negligence), and a sanction of six months ineligibility was imposed on Athlete H, and four months ineligibility on Athlete T.

Background Facts

Athlete H and Athlete T, track athletes, were both charged with an Article 32.2(a) ADRV of the UKA Anti-Doping Rules following an AAF for the presence of two Prohibited Substances; i) a Metabolite of a substance similar to an anabolic steroid; and ii) a Metabolite of an exogenous anabolic steroid. Both athletes admitted the charge but denied intentionally taking the Prohibited Substances, and sought an elimination from the standard sanction under Article 40.5(a) UKA Anti-Doping Rules, the equivalent of Article 10.5.1 of the WADC on the basis that they were not at fault. Alternatively, both Athletes sought a reduction in their

sanctions under Article 40.5(b) UKA Anti-Doping Rules, the equivalent of Article 10.5.2 of the WADC on the basis that they were not significantly at fault.

Reasoning and Decision of the Tribunal

Both athletes were able to prove to the comfortable satisfaction of the panel that the Prohibited Substances entered their systems through ingestion of a contaminated batch of 'Mountain Fuel', an energy drink that had been recommended by a sports nutritionist and owner of the distributing company, Mr F. Athlete T had declared his use of 'Mountain Fuel' on the Doping Control Form (DCF), but Athlete H did not, alleging that he had forgotten and had felt rushed. Both Athletes had provided an In-Competition sample previously with negative results when using 'Mountain Fuel' and could also demonstrate that they had taken some steps to re-assure themselves that the supplements did not contain Prohibited Substances. It was on this basis that Athletes H and T sought an elimination of the period of ineligibility.

UKAD accepted that Athletes H and T had both established how the Prohibited Substance entered their systems, but argued that both Athletes had departed from the expected standard of behaviour in failing to show a reasonable degree of research and consultation to ensure that the use of the supplement was 'clean'. In particular, they had been too keen to rely on assurances from the supplier of the product, had not consulted the IAAF, Welsh Athletics, British Athletics, UKA or UKAD nor a qualified medical practitioner with expertise in doping.

The Tribunal accepted the athletes' evidence that they had not knowingly taken anything containing the Prohibited Substances, but found that that Athletes H and T had both failed to show the necessary due diligence that would be expected of an athlete of their standing, which would enable them to be absolved of *any* fault. Accordingly, the Tribunal held that each bore some degree of fault but that it was not significant and were therefore entitled to a reduction in sanction from the standard 2-year period. Disclosure of the product on the DCF (or lack of it) is a relevant consideration under the World Anti-Doping Code

(WADC) and therefore the Tribunal assessed Athlete H to be more at fault than Athlete T.

In considering the issue of sanction, the Tribunal also had to consider which provisions should govern the discretion they had to exercise. Although the violations occurred under the UKA ADR 2014/15 (based on the 2009 WADC), the imminent implementation of the amended 2015 WADC (which provided greater flexibility to the tribunal in deciding sanction) raised the relevance of the principle of *lex mitior* and also one of the costs of further appeals. As a result, in deciding on the sanction, the Tribunal decided it was prudent to apply Article 10.5.1.2 WADC 2015 and duly imposed a sanction of six months ineligibility on Athlete H, and four months ineligibility on Athlete T.

Learning Points

- Where an Athlete seeks to rely upon Article 10.4 or 10.5 WADC 2015 (no Fault or Negligence, or no Significant Fault or Negligence), sanction will be determined by assessing the facts of the individual case and the athlete's degree of fault based on their particular circumstances.

- The bar that athletes must meet to demonstrate no degree of fault is very high. Athletes should ensure they have carried out reasonable due diligence before taking supplements. For example, Elite athletes should check qualifications of nutritionists they consult, ensure they consult a qualified medical practioner with expertise in doping, seek certification confirming independent batch testing of products (and not just rely on testing of one particular batch); consult relevant NGBs and national Anti-Doping agencies.

- Where athletes have already served a period of suspension, the 'quality' of that time (i.e. missing a major competition) is not a relevant factor in determining the overall sanction in the same way that subjective factors such as the earnings lost or competitions affected after the date of a hearing is not relevant.