



Tribunal Arbitral du Sport
Court of Arbitration for Sport

CAS 2005/A/990 Pobyedonostsev v/IIHF

ARBITRAL AWARD

rendered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Dr Dirk-Reiner Martens, Attorney-at-Law, Munich, Germany

Arbitrators: Prof. Richard H. McLaren, Attorney-at-Law, London, Canada
Dr Hans Nater, Attorney-at-Law, Zurich, Switzerland

in the arbitration between

OLEKSANDR POBYEDONOSTSEV

represented by Mr Oleg Kuchanskyy, Attorney-at-Law in Kiev, Ukraine and Mr Edward
W. Pilot, Attorney-at-Law in Beverly Hills, USA

- Appellant -

and

INTERNATIONAL ICE HOCKEY FEDERATION

represented by Dr András Gurovits Kohli of Niederer, Kraft & Frey, Attorneys-at-Law,
Zurich, Switzerland

- Respondent -

This is an Appeal against a decision of the International Ice Hockey Federation Disciplinary Committee dated 14 November 2005, by which Mr Oleksandr Pobyedonostsev was suspended from participation in all competitions or activities authorized or organized by the International Ice Hockey Federation (IIHF) or any IIHF Member National Association because of a positive doping test.

I. THE PARTIES

1. The Appellant Oleksandr Pobyedonostsev (the "Appellant" or the "Player") is a Ukrainian national. He is a professional ice hockey player.
2. The International Ice Hockey Federation (the "Respondent" or "IIHF") is the federation of national ice hockey associations governing the sport of ice hockey.

II. UNDISPUTED FACTS

3. The Appellant participated in the IIHF Senior Ice Hockey Championship 2005 in Vienna and Innsbruck as a member of the National Ice Hockey Team of the Ukraine.
4. On 1 May 2005, after the game between Ukraine and Sweden, the Appellant was requested to submit to doping control.
5. The analysis of the "A" sample showed the presence of norandrosterone, a metabolite of the anabolic steroid nandrolone, which is a prohibited substance under the IIHF anti-doping rules. The "B" test confirmed this result.
6. On 14 November 2005 the IIHF Disciplinary Committee ("IIHFDC") imposed a two-year suspension on the Player for having committed an anti-doping rule violation (the "Contested Decision"). The suspension started 5 May 2005 and was to end on 04 May 2007.

This decision by the IIHF is the subject matter of the appeal filed by the Player on 13 December 2005.

7. On 28 December 2005 the Player also filed an application for a stay of the execution of the IIHFDC decision. The application was dismissed on 19 January 2006.

III. THE CONTESTED DECISION

8. The Contested Decision came to the conclusion that the Player committed an anti-doping rule violation and that he failed to provide sufficient evidence that he was without (significant) fault or negligence in connection with this violation. In particular, the Contested Decision argues that the Player did not prove that *"the presence of the prohibited substance ... has its source in a medical treatment of the alleged heart ailment with retabolil"*.
9. The Contested Decision further concluded that the Player failed to prove, *"that the treatment of a heart ailment with retabolil met the medical standard in the Republic of Belarus, or has given any verifiable reason why he nevertheless would have been treated in such a way"*. According to the Contested Decision the documentation produced by the Player *"leaves open whether the injection actually has been performed"*.
10. The Contested Decision also states *"that the Panel received the information about his [the Player's] treatment only through Mr. Pobyedonostsev and that the Panel neither got information about the person who treated him nor a statement on the medical indication of the treatment with retabolil"*.
11. As a result, the Contested Decision concludes that *"the Panel has not found any evidence that the presence of the prohibited substance has been or could have been caused by a medical treatment he [the Player] was not aware of"*.

IV. THE PARTIES' SUBMISSIONS**IV.1. THE PLAYER'S SUBMISSIONS**

12. The Player submits that during a championship game of his team "Khimovokno-Mogilev" in Belarus on 21 March 2005 he was body checked by a player of the opposite team and, as a result, hit the boards so hard that he had to be taken off the ice. In the changing room he was helped out of his hockey gear and then taken to the hospital where he was treated on account of acute heart failure which was later diagnosed as "Postcardio cardiosclerosis". In the emergency room he was given intravenous and intramuscular injections. The Appellant contends that unbeknownst to him one of these injections was 1 ml of Retabolil 5%, a steroid also known as Nandrolone.
13. According to the Player, the team doctor failed to accompany him to the hospital, a fact which caused the team to terminate the doctor's engagement by the team.
14. The Player further submits that when arriving at the hospital he was in a very bad physical and mental condition which made it impossible for him to monitor or even ask questions about the treatment which was going to be applied. He was in severe pain and all he cared about was saving his life.
15. According to the Player, his physical condition improved rapidly after his treatment on 21 March 2005 in the hospital which allowed him not only to leave the hospital the next day but also to resume training approximately two weeks later and to join the Ukrainian national team on or about 15 April 2005. After leaving the hospital he did not pay much attention to the incident and was merely looking forward to being part of the Ukrainian national team during the forthcoming World Championship.
16. Following his positive doping test on 1 May 2005 the Player conducted his own investigations as to how the prohibited substance had entered his body. In June

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2005, he requested from the hospital the documentation of his treatment on 21 March 2005. The documentation provided to him was initially inconclusive as to the type of injections administered to him. Only after a change in the hospital administration in November 2005 did the Player receive additional documents which proved, inter alia, the injection of Retabolil.

17. As a result of his submissions under paragraphs 12 to 16 above, the Player argues that he cannot be accused of having "used" a prohibited substance within the meaning of the IIHF regulations. The term "use" required an action on the part of the Player and cannot be extended to a situation where he was injected with a (prohibited) substance without his will and knowledge.

But even if the mere presence of a prohibited substance in his body was to be considered a doping offence, in the Player's opinion he bears no fault or negligence in connection with his positive doping test because he was physically and mentally unable to control the treatment applied on 21 March 2005.

18. The Player therefore requests the CAS to set aside the Contested Decision.

IV.2. THE RESPONDENT'S SUBMISSIONS

19. The Respondent argues that the mere presence of a prohibited substance in an athlete's bodily specimen constitutes an anti-doping rule violation pursuant to the IIHF and WADA rules. No intent, negligence or knowing use was necessary. There can thus be no doubt that the player committed an anti-doping rule violation.
20. With respect to the Player's claim of no (significant) fault or negligence on his part, the Respondent contends that the Player "*did not offer any adequate evidence that would support his allegations that have to be qualified as untrustworthy in their entirety*".

21. The Respondent also argues that even if one were to assume in the Player's favour that he was without fault or negligence in connection with the injection of Retabolil on 21 March 2005, *"he would still have had the obligation to care about what substances he received and to disclose his medical treatment prior to entering the World Championship and the training camp"* (which the Player does not contest having failed to do).

V. PROCEDURAL ISSUES

22. A first hearing was held in this matter on 21 April 2006 at which the Player's witnesses were unable to attend because of visa problems. Despite the IIHF's agreement to hear the witnesses' testimony via telephone conference, the Panel felt unable to do so because it wanted to form its own view and ask questions in the witnesses' physical presence. Therefore, the matter was adjourned to another day.
23. A second hearing was held on 21 June 2006 in which, in addition to the members of the Panel, the following persons participated:

Oleksandr Pobyedonostsev, the Appellant

Oleg Kuchansky, counsel for the Appellant

Anastasia Valerievna Prischepa, Witness

Alaksei Minkin, Director of the ice hockey club, Witness

Dr Aliaksandr Skabialka, Expert-Witness for the Appellant

Dr Beat Villiger, Expert-Witness for the Respondent

András Gurovits Kohli, counsel for the Respondent.

VI. THE EVIDENCE

24. At the hearing on 21 June 2006 the *viva voce* testimony of three witnesses on behalf of the Appellant was taken.

VI.1. ANASTASIA VALERIEVNA PRISCHEPA

25. The Appellant had submitted on 27 January 2006 a "Declaration" of Ms Prischepa which stated inter alia the following:

"1. I am a resident of Mogilev, Republic of Belarus. I have personal knowledge of the facts set forth in this Declaration, and if called upon as a witness, I could and would competently testify thereto. I have been a Licensed Professional Nurse in the Republic of Belarus since August 2001.

2. I was employed by and working at the Health Establishment Medical Aid Post of the Industrial Public Corporation Mogilevhimvolokno on March 21, 2005, when MR. OLEKSANDR POBYEDONOSTSEV was brought in for acute heart failure treatment. Because I was physically present during the treatment given to Mr. Pobyedonostsev, I know that he was being treated for acute heart failure.

3. I was the Nurse who was assigned to the doctor who was treating Mr. Pobyedonostsev for his heart failure. The doctor expressly directed me to inject Retabolil and Mildronat into Mr. Pobyedonostsev, and I gave the intravenous and intramuscular injections of Retabolil and Mildronat to Mr. Pobyedonostsev on March 21, 2005.

4. Based upon my personal and professional observations of Mr. Pobyedonostsev, it was evident to me that he was not aware of the nature of the injections that I gave him on March 21, 2005, and that he was in a very bad physical and mental condition. Mr. Pobyedonostsev could not even speak as a result of his intense pain. No one advised Mr. Pobyedonostsev what procedures were being employed to treat his acute heart failure and no one told him what injections were being given to him. In fact, it would have been highly unusual if anyone gave a patient this type of information.

5. In my professional career I do not recall any patient's ever coming back to the hospital to interrogate a doctor or other staff members about the treatment that he had been given unless there were adverse medical consequences from the treatment. I have not heard of any adverse medical reactions Mr. Pobyedonostsev had to the treatment which we gave to him."

26. Ms Prischepa confirmed her above declaration at the 21 June 2006 hearing and added that she had personally prepared it in "colloquial Russian" with very few amendments made with the help of the Player's attorney.

27. When asked by the Panel and the attorneys for both parties, Ms Prischepa made

the following additional statements:

- that she remembered the Player and the incident on 21 March 2005 on the basis of documents she had filled out after the Player had arrived at the emergency room of the hospital;
- that the Player arrived on a stretcher at the emergency post of the hospital at about 6 p.m. He was wearing an athletic uniform and was unable to walk.

VI.2. ALAKSEI MINKIN

28. Mr Minkin is the director of the ice hockey club "Khimovolokno-Mogilev" and was present at the game on 21 March 2006. He testified that in the middle of the second time of the game which had started at 5 p.m. the Player collided with an opponent and hit the board so hard that he had to be taken off the ice. Mr Minkin helped the Player out of the hockey gear. Mr Minkin was subsequently told that the Player was taken to the hospital while the game continued. Mr Minkin saw the Player the next day who did not report any symptoms of a heart condition.

VI.3. DR. ALIAKSANDR SKABIALKA

29. Dr Skabialka is the Deputy Doctor-in-Chief of the Mahiljow Region Medical Centre for Sport Medicine. He testified that the steroid known as Retabolil is still in use in Belarus.
30. When asked why a doctor would inject Retabolil in a patient with a heart condition, Dr Skabialka stated that this doctor must be of the "old generation" when Retabolil was administered in these circumstances. According to Dr Skabialka this was occasionally still the case in Belarus in that under the poor economic circumstances of the country, hospitals tend to apply those medication which they have available.

VII. THE APPLICABLE RULES AND REGULATIONS

31. According to Article R 58 of the Code of Sports-related Arbitration the "*Panel shall decide the dispute according to the applicable regulations and ...*"; in this case these are the IIHF Disciplinary Regulations.

VIII. DISCUSSION

32. On the basis of the parties' submissions and the testimony of the witnesses, there can be no doubt – and it is uncontested – that a prohibited substance was present in the Player's urine sample collected on 1 May 2005 and that, therefore, he committed an anti-doping rule violation. Based on the evidence before it, the Panel concludes that the presence of the prohibited substance was caused by the *injection of Retabolil in the emergency room of the hospital.*
33. The Panel does not have to discuss the question of whether the Player "used" a prohibited substance in that according to Section 6.3(a) of the IIHF Disciplinary Regulations

"In case of presence of a prohibited substance in an athlete's bodily specimen (Code [i.e. World Anti Doping Code] Article 2.1).

...

The following sanctions shall apply:

- *First violation: Two years ineligibility"*

the mere presence of a prohibited substance in an athlete's urine sample constitutes and anti-doping rule violation. It is generally accepted and has been recognised by the Court of Arbitration for Sport in numerous awards that this so-called strict liability principle is not objectionable under Swiss law as long as the athlete has a right to adduce counter evidence as to his fault or negligence in connection with his doping violation.

34. According to Section 3.10 of the IIHF Disciplinary Regulations "*(T)he Deciding*

Panel [i.e. the IIHF Disciplinary Committee] ... gives the alleged person [i.e. the Player] the possibility of establishing a basis for eliminating or reducing the sanctions as foreseen in Article 10.5 of the Code [i.e. the World Anti-Doping Code]". Article 10.5 of the Code burdens the athlete with proving the absence of (significant) fault or negligence on his part thus shifting the burden of proof to the athlete. This principle has been recognised by CAS as not being in violation of Swiss law (CAS 2005/A/830 G. Squizzato v/ FINA, seq. 10.17). The standard of proof is a balance of probability (Art. 3.1 of the World Anti-Doping Code).

Consequently, the only issue for this Panel to decide in this matter is whether the Player was able to establish that he bears either no fault or negligence or no significant fault or negligence for the Anti-Doping Rule Violation. In the Panel's opinion the Player succeeded in proving that he bears no fault or negligence.

35. The Contested Decision which, unlike this Panel, did not have the benefit of Ms Prischepa's written declaration of 23 January 2006 and of the live testimony of the three witnesses (VI. above), was not convinced of the truthfulness of the Player's explanation as presented at the time when the Contested Decision was made and thus concluded that it did not find "*any evidence that the presence of the prohibited substance has been or could have been caused by a medical treatment he [the Player] was not aware of*". Likewise, the Respondent's Disciplinary Committee found the Player's allegations "*untrustworthy in their entirety*" and further argued that "*it would have been the obligation of Appellant [the Player] to call for witnesses who were at the hospital and can confirm that the Appellant was treated in the way alleged by Appellant, that he had a heart failure and that Appellant was given the substance without Appellant's knowledge*". This is exactly what the Player did by bringing three witnesses to the hearing on 21 June 2006 who fully confirmed the Player's explanation.
36. On the basis of the evidence provided by the Player since the Contested Decision was made, the Panel finds that sufficient evidence has been provided by the Player that under the unique circumstances of this case he was unable to influence or

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control the treatment applied to him in an emergency situation. The Panel can find no reason to put into question Ms Prischepa's testimony that the Player was "*in a very bad physical and psychological condition ... As a result of severe pain (he) was unable even to speak*". In these circumstances he was unable to prevent the treating doctor from administering a prohibited substance. The Panel is thus of the opinion that the Player demonstrated that he was without fault or negligence for the anti-doping rule violation and that the otherwise applicable period of ineligibility must be eliminated.

37. It is irrelevant under the circumstances of this case whether the diagnosis of an "*acute heart failure*" was accurate or whether – as is stated in the Contested Decision – "*the treatment of a heart ailment with Retabolil met the medical standards in the Republic of Belarus*" or that of Western Europe or North America. There is clear evidence that Retabolil was administered and that the Player had no means of preventing its administration. This is sufficient reason to discharge the Player's burden of proof of no fault or negligence in the circumstances of this case.

38. In his closing statement, counsel for the Respondent posed a number of questions which he believes remain unanswered, e.g.

- why a steroid like Retabolil was administered in a case of an alleged heart failure where steroids are known to cause rather than cure such illness,
- why no follow-up treatment was made after an acute heart failure,
- why the Player did not inform the Ukrainian national team of his alleged illness.

All of these questions are irrelevant for the outcome of this case unless they are designed to challenge the credibility of the Player's explanation. In this respect, however, the Panel found the witnesses' testimony convincing and trustworthy and therefore reaches the conclusion that the Player must be considered as being

without fault or negligence.

The Panel recognises that Dr Beat Villiger, who testified as an expert-witness on behalf of the Respondent, expressed doubts as to the accuracy of the diagnosis of a heart condition because of the Player's speedy recovery. However, the fact remains that Retabolil was administered to the Player at a point in time when he had no control over what was happening to him.

39. Finally, the Respondent argues that *"even if one was to accept in favour of Appellant that the substance was given to him without any fault and knowledge on his side, he would still have had the obligation to care about what substance he received and to disclose his medical treatment prior to entering the World Championship and the training camp"*, thereby implying that the Player's failure to do so would by itself constitute an anti-doping rule violation. In fact, the question must be asked whether an athlete who is without fault or negligence in connection with the entering of a prohibited substance into his body is still liable for an anti-doping rule violation if he negligently fails to disclose this fact and to apply for a (retroactive) Therapeutic Use Exemption ("TUE").
40. The Code considers "the presence" of a prohibited substance in an athlete's bodily specimen as an anti-doping rule violation. Consequently, such "presence" constitutes a violation at any point in time from the moment the substance enters the body until it is no longer "present". In order to escape the sanctions under the Code, the athlete must establish that he bears no (significant) fault or negligence "for the violation" (Section 10.5 of the Code). The Code is not entirely clear as to whether such defence requires the athlete to prove that he is without fault or negligence not only in connection with the entering of the substance into his body but also in respect of that substance staying there. The latter interpretation is supported by Section 4.7 of the WADA International Standard for Therapeutic Use Exemptions which provides:

"An application for a TUE will not be considered for retroactive approval except in case where:

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a. *emergency treatment or treatment of an acute medical condition was necessary, ..."*

41. This rule indicates that in the present case the Player would in fact have been obligated to apply for a retroactive TUE and that his failure to do so makes him liable for sanctions under the Code unless he establishes that he bears no fault or negligence in connection with this failure.

42. The Panel does not have to decide whether this is the proper construction of the Code because in the unique circumstances of this case the Player bears no fault or negligence for his failure to disclose his treatment and to apply for a (retroactive) TUE. The evidence has shown that the Player found out long after his positive test that he had been treated for a heart condition. From the Player's perspective, he was taken to the hospital after he was body checked and had hit the boards very hard. He left the hospital less than 24 hours after the incident and was able to resume training soon thereafter. Under these circumstances, the Panel considers that the Player had no reason to suspect that he was treated with a substance which – contrary to practice in Western Europe – was being applied for a heart condition. Therefore, the Player was without fault or negligence in connection with his failure to disclose his treatment and to apply for a (retroactive) TUE.

LX. COSTS

43. Pursuant to Article R65.1 of the Code, disciplinary cases of an international nature shall be free, except for the Court Office fee to be paid by the Appellant and retained by the CAS.

44. Article R65.3 of the Code provides as follows: "*The costs of the parties, witnesses, experts and interpreters shall be advanced by the parties. In the award, the Panel shall decide which party shall bear them or in what proportion the parties shall share them, taking into account the outcome of the proceedings, as well as the conduct and financial resources of the parties*".

45. Having given due consideration to the merits of this case and to the conduct and financial resources of the parties, the Panel has decided that each party shall bear its own costs.

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ON THESE GROUNDS


The Court of Arbitration for Sport rules:

1. The Appeal filed by Mr Oleksandr Pobyedonostsev on 1 December 2005 is upheld.
2. The decision and the suspension imposed on Mr Oleksandr Pobyedonostsev by the Disciplinary Committee of the International Ice Hockey Federation on 14 November 2005 are annulled.
3. The Award is rendered without costs except for the Court Office fee of CHF 500 (five hundred Swiss Francs), which is retained by the CAS.
4. Each party shall bear its own costs.

Done in Lausanne, 24 August 2006

The operative part of this award was notified to the parties on 21 June 2006.

THE COURT OF ARBITRATION FOR SPORT


Dirk-Reiner Martens
President of the Panel