

CAS 2005/A/879

FINAL ARBITRAL AWARD

Pronounced by the
COURT OF ARBITRATION FOR SPORT
OCEANIA REGISTRY
Appeal Division

Sitting in the following composition:

Panel:

Mr Malcolm Holmes QC (President)
The Hon Justice Tricia Kavanagh
The Hon Robert Ellicott QC

In the matter of:

MS REBEKAH KEAT

Represented by Mr Dale Cliff, solicitor

Appellant

and

TRIATHLON AUSTRALIA

Represented by Mr Ian Fullagar, solicitor

Respondent

AUSTRALIAN SPORTS DRUG AGENCY

Represented by Ms Suzanne Wallace, solicitor

Affected Party

Court assisted by: Mr Richard Redman, solicitor.

Date and place of hearing: The appeal was determined on the papers.

Date of Award: 2 February 2006

PRELIMINARY

1. Rebecca Keat (the **Appellant**) is an elite athlete contracted to Triathlon Australia Limited (the **Respondent**). As a contracted athlete, the Appellant has agreed to be bound by the terms of the Respondent's Anti-doping Policy which took effect on 13 August 2004 (the **Policy**).
2. Article 5 of the Policy provides as follows:
 - 5.1 The presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's* bodily *Specimen*.
 - 5.1.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their bodily *Specimens*. Accordingly, it is not necessary that intent, fault, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping violation under Article 5.1.
 - 5.1.2 Excepting those substances for which a quantitative reporting threshold is specifically identified in the *Prohibited List*, the detected presence of any quantity of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample* shall constitute an *Anti-Doping Rule Violation*.
 - 5.1.3 As an exception to the general rule of Article 5.1, the *Prohibited List* may establish special criteria for the evaluation of *Prohibited Substances* that can also be produced *Endogenously*.
3. On 28 November 2004 the Appellant competed in IronMan Western Australian, an event comprising a 3.8 kilometre swim, a 180 kilometre cycle and a 42.2 kilometre run. At the completion of that event the Australian Sports Drug Agency (**ASDA**) selected the Appellant for testing. The testing of both the (A) and (B) samples by ASDA yielded positive results for the presence of the Prohibited Substance Nandrolone, at levels in excess of the permitted level of 2mg/ml. The Appellant was served with an infraction notice pursuant to the Policy on 9 February 2006 and was also given notice that the board of the Respondent imposed a provisional suspension upon her, with effect from the receipt of the infraction notice until determination at a substantive hearing. The Appellant disputed that there had been a violation of the Policy, and the matter was then referred to the Court of Arbitration for Sport for determination.
4. The Court of Arbitration for Sport by its Award dated 18 May 2005 determined that there had been a breach of the Policy and the Appellant was disqualified from the IronMan Western Australia competition held on 28 November 2004 and all medals, points and prizes awarded to her for winning that event were forfeited. Further, the

Appellant was declared ineligible to compete for 2 years commencing on 9 February 2005. The Appellant was ordered to pay the costs of the Respondent.

5. By an application dated 20 April 2005 the Appellant lodged an appeal against all matters determined by the Award of 18 May 2005. Subsequently the Appellant limited the appeal to the question of the length of penalty only and in no way sought to contest the other findings of ASDA or those contained in the Award dated 18 May 2005. The parties then asked the panel to determine the question of penalty on the documents and written submissions.

DISCUSSION

6. Where there is a violation of the Policy, there is an automatic disqualification of the individual results obtained in that competition under Article 12. It is not possible to vary the penalty in that respect. In contrast, the period of ineligibility under the Policy may be varied depending upon certain criteria in the Policy being met and subject to the circumstances of the case. Article 13.2 provides that the period of ineligibility imposed for a violation of Article 5.1 of the policy for a first violation, as in this case, is 2 years. Article 13.2 further provides that an athlete "shall have the opportunity ... before a period of ineligibility is imposed to establish the basis for eliminating or reducing this sanction as provided in Article 13.6."
7. Article 13.6.1 relevantly provides that:

"If the *Athlete* establishes in an individual case involving an *Anti-Doping Rule Violation* under Article 5.1 (Presence of Prohibited Substance or its Metabolites or Markers) or use of a prohibited substance or prohibited method under Article 5.2 that he or she bears no fault or negligence for the violation, the otherwise applicable period of ineligibility shall be eliminated. When a prohibited substance or its markers or metabolites is detected in an athlete's specimen in violation of 5.1 (Presence of Prohibited Substance), the athlete must also establish how the prohibited substance entered his or her system in order to have the period of ineligibility eliminated."

8. In contrast to Article 13.6.1 which refers to an absolute state of "no fault or negligence", Article 13.6.2 applies where there is "no *significant* fault or negligence" (*our emphasis*). Relevantly, Article 13.6.2 provides as follows:

"This Article 13.6.2 applies only to *Anti-Doping Rule Violations* involving Article 5.1 (presence of *Prohibited Substance* or its *Metabolites* or *Markers*), *Use of Prohibited Substance* or *Prohibited Method* under Article 5.2 ... If an *Athlete* establishes in an individual case involving such violations that he or she bears *No Significant Fault* or *Negligence*, then the period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the minimum period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this section may be no less than 8 years.

When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete's Specimen* in violation of Article 5.1 (presence of *Prohibited Substance*), the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* reduced."

9. Article 13.6.2 applies only to Anti-Doping Rule Violations involving; Article 5.1 (presence of Prohibited Substance or its Metabolites or Markers); Article 5.2 (use of a Prohibited Substance or Prohibited Method); Article 5.3 (failing to submit to Sample collection); or Article 5.8 (administration of a Prohibited Substance or Prohibited Method).
10. If an Athlete establishes in an individual case involving such violations that he or she bears *No Significant Fault or Negligence*, then the period of ineligibility may be reduced, but that reduced period of ineligibility may not be less than one-half of the minimum period of ineligibility otherwise applicable. If the otherwise applicable period of ineligibility is a lifetime ban, then the reduced period under this section may be no less than 8 years. When a Prohibited Substance or its markers or metabolites is detected in an athlete's specimen in violation of Article 5.1 (presence of Prohibited Substance), the athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of ineligibility reduced.
11. The Terms "no fault or negligence" and "no significant fault or negligence" are defined in Appendix 1 to the Applicant's Anti-Doping Policy:

"No fault or negligence: the Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had used or been administered the prohibited substance or prohibited method.

No significant fault or negligence: the Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for no fault or negligence, was not significant in relationship to the Anti-Doping Rule Violation."

ISSUE

12. The Appellant, at the initial hearing, was unable to produce any, or any sufficient, evidence as to how the prohibited substance had entered her system.
13. During the course of the preparation for the hearing for the appeal, the parties requested more time to enable further investigation to be carried out and subsequently the panel was advised that: "the parties have accepted that the product Endurolyte produced by the Sports nutrition company, Hammer Nutrition, which was consumed by [the Appellant] during the Ironman WA could contain the banned substance Nandrolone".

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14. On the basis of that agreement, the Appellant sought either that the period be eliminated or that her period of eligibility be reduced to 12 months only. However, the Appellant's submissions in reply suggest that the Appellant's submissions are confined to Article 13.6.2 namely that she bears no significant fault or negligence in respect to the presence of the prohibited substance.
 15. The Appellant submitted that the ingestion of the prohibited substance was not a deliberate attempt on her part to enhance her performance by the use of Nandrolone. It was said that she had inadvertently consumed a supplement which could contain Nandrolone. In her evidence and submissions she gave details of 3 new products that had been included in her diet and gave extensive evidence of her food and liquid intake in the weeks leading up to the IronMan Western Australia event. She detailed the specific nutritional aids that she had ingested at the time and stated that she had: "written and verbal guarantees from my sponsor for all the products supplied." She said that she had also checked the ingredients with the ASDA hotline and satisfied herself that they were free of any prohibited substance. She further stated that due to a lack of financial capacity it is not possible to have every single supplement taken tested in an accredited laboratory.
 16. At the time of receiving the supplements from a director of Hammer Nutrition, the Appellant said she was concerned to ensure that the supplements contained no banned substance. At the time the director, Mr David Williams, gave the Appellant an assurance that Hammer Nutrition products did not contain any banned substance and that assurance was repeated during the course of the these appeal proceedings when by letter dated 7 October 2005 Mr Williams stated that:

"All Hammer Nutrition products are 100% natural, never have and never will contain any stimulants, hormones, steroids or banned substances."
 17. In evidence before the initial hearing and on this appeal, it appears that Endurolyte is not an approved product in the supplements information scheme operated by ASDA. That scheme allows supplement manufacturers to have the content of their products independently analysed and verified. ASDA then communicates the results of this analysis to Australian athletes. This information better informs athletes as to the contents and guarantees for the supplements. The panel notes that in the doping control test form signed by the Appellant on 28 November 2004 she did not disclose that she had taken these supplements and in particular, Endurolyte, an unapproved supplement.
 18. The panel endorses the remarks made in the Award of 18 May 2005 that these discrepancies are cause for concern and highlight the need for elite athletes to be scrupulous in their choice of products to ingest and to ensure that such products and in particular, supplements and their ingredients, have been approved by ASDA. It is no answer to submit, as the Appellant did, that as a sponsored athlete

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- she had an obligation to use that company's supplements as part of her racing regime.
19. In considering the appeal, the panel is conscious that Article 6.1 of the Respondent's Policy states that: "where the Policy places the burden of proof upon an athlete to establish a fact or circumstance, the standard of proof shall be by a balance of probability".
 20. The first issue to be addressed is whether or not the Appellant has established "how the prohibited substance entered her system" in order to have the benefit of either Article 13.6.1 to have the period of eligibility eliminated or Article 13.6.2 to have the period of ineligibility reduced. The agreement relating to this fact which was reached between the parties on the appeal and which is set out in full above is not in terms of the fact being established, but merely that the product Endurolyte "could" contain the banned substance Nandrolone.
 21. The panel is prepared to proceed on the assumption that the product Endurolyte *did* contain the banned substance Nandrolone and was consumed by the Appellant.
 22. It is then necessary to address the second issue under the Article, namely whether or not there was "no *significant* fault or negligence" on the part of the Appellant.
 23. The Appellant relies upon the following matters:
 - (a) The product was not purchased by her over the counter. It was a product which was supplied to her by her long-time sponsor, Hammer Nutrition.
 - (b) The Appellant did not take the contaminated supplement for the purpose of benefiting from the prohibited substance;
 - (c) Her long-time sponsor has no reputation for producing contaminated products and its products are widely distributed and available in Australia;
 - (d) The Appellant took reasonable precautions in that she made investigations and confirmed that the product was not banned, and she obtained a verbal and written guarantee from Hammer Nutrition; and
 - (e) It was not financially possible for an athlete to test all products.
 24. It is necessary to weigh the efforts and precautions undertaken by the Appellant in their totality. It is also necessary to put them in their proper context. The Appellant relies upon a nutritional supplement as being the cause of her ingestion of the prohibited substance. The supplement had not been tested by ASDA and had not been approved. The Policy stresses that all athletes must take full responsibility for what they ingest and use. It was a product by which she sought to replace electrolytes such as the loss of salt and magnesium which prevents cramping during dehydration.
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25. The commentary in the World Anti-Doping Code on the equivalent provision to Article 13.6 where the period of suspension may be reduced, contains a note that the Article is meant to have an impact only in cases where the circumstances are truly exceptional. The Court of Arbitration for Sport in its award in the case of *Edwards v IAAF and USATF* (CAS OGO4/003) emphasised that (at page 16):

"It would put an end to any meaningful fight against doping if an athlete was able to shift his/her responsibility with respect to substances which enter the body to someone else and avoid being sanctioned because the athlete himself/herself did not know of the substance."

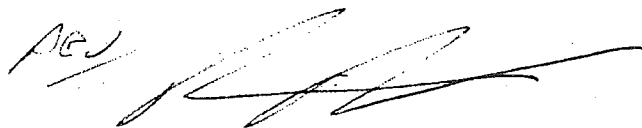
26. Similarly in the present case, the Panel finds that it is not sufficient to rely on the assurances from a sponsor in relation to a supplement produced by that sponsor where the supplement has not been approved by ASDA. Accordingly, in the circumstances the panel is not satisfied that there has been no significant fault or negligence. The appeal will be dismissed and the finding at first instance affirmed.
27. In relation to costs, the Appellant submitted briefly that it is reasonable for each party to bear its own costs and expenses incurred in connection with both the initial determination and on appeal. In relation to the appeal, the parties are to be commended for all issues being resolved other than penalty without the necessity for a hearing and in conducting the hearing on penalty on the documents. However, the Appellant has been unsuccessful. The Respondent should have a contribution to its costs and in assessing such contribution, the Court is required to take into account the outcome of the proceedings as well as the conduct and financial resources of the parties. In order to determine the contribution to be made by the Appellant, the Court will require specific details of the extent of the costs incurred by the parties. Upon receipt of that information, together with details of the financial resources of the parties, the Court will then determine the extent of the contribution to be made by the Appellant to the Respondent. The panel does not propose to interfere with the costs order made at the initial hearing.

DECISION

28. The Court of Arbitration for Sport hereby rules:
- (a) The appeal by Rebecca Keat be dismissed; and
 - (b) The Appellant, Rebecca Keat, is ordered to pay the Respondent's costs in respect of legal fees and other expenses in a quantum to be determined by the Court.

Sydney, 1 February 2006

THE COURT OF ARBITRATION FOR SPORT



Malcolm Holmes QC
President of the Panel

The Hon Justice Tricia Kavanagh
Arbitrator

The Hon Robert Ellicott, QC
Arbitrator